

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 59

LAMONT WILLIAM BOWMAN, PETITIONER,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA AND
MARTIN J. LOPERENA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1940.

CERTIORARI GRANTED JUNE 2, 1940.

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No. :

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

LAMONT WILLIAM BOWMAN,

Debtor.

LAMONT WILLIAM BOWMAN,

Appellant,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA,
MARTIN J. LOPERENA, PHYLLIS FELICIANA
BOUTON, GREGORIO LOPERENA and SEBAS-
TIANA LOPERENA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Southern Division.

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Names and Addresses of Attorneys.

For Appellant:

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411 West Fifth Street,

Los Angeles, California.

For Appellees, the objecting creditors, Martin Loperena,
Gregoria Loperena, Martin J. Loperena, Phyllis
Bouton, Gregorio Loperena and Sebastiana Loperena:

NOON & NOON, Esqs.,

FRED NOON, Esq.,

First National Bank Building,

San Diego, California.

UNITED STATES OF AMERICA, ss.

To MARTIN LOPERENA and GREGORIA LOPERENA; MARTIN J. LOPERENA, PHYLLIS FELICIANA BOUTON; GREGORIO LOPERENA and SEBASTIANA LOPERENA; Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 17th day of April, A. D. 1938, pursuant to an order allowing appeal filed on March 18th-1938, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 1048-, Southern Division, wherein LAMONT WILLIAM BOWMAN is appellant and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Paul J. McCormick United States District Judge for the Southern District of California, this 18th day of March, A. D. 1938, and of the Independence of the United States, the one hundred and sixty second.

Paul J. McCormick
U. S. District Judge for the Southern District
of California

Service of a copy of the foregoing citation, Petition for Appeal to Circuit Court of Appeals, (Ninth District) and Assignment of Errors, is acknowledged this 31st day of March, 1938.

Noon & Noon
B
Attorney for Appellee

[Endorsed]: Filed May 13 1938 at 9:45 A. M. R. S.
Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

REFeree's JUDGMENT DOCKET OF
CLAIMANTS
CLAIM SHEET

Re: Bowman, William Lamont, Debtor No. 1048

Claim No.	Filed Mo	Filed Day	CREDITORS AND ADDRESS	ATTORNEY AND ADDRESS
1	6	17	35 Los Angeles Soap Co. (617 E. 1st St, L. A.)	Craig & Weller
2	7	8	35 C. R. Hammond (Auditor) (Spreckels Theatre Bldg.)	—
3	7	22	35 Charles L. Sloane 2143 Market Street	—
4	—	—	Charles L. Sloane 2143 Market Street	Harrison G. Sloane (Bk. of America Bldg)
5	7	26	35 Brunswick Drug Co. (P. O. Box 176) Los Angeles	—

AMOUNT CLAIMED	AMOUNT ALLOWED		DIVIDEND Claims	DIVIDEND % Claims
	General Claims	Prior or Secured Claims		
10.80				
449.98				
1700.00				
250.00				
5213.07				

CERTIFICATE

UNITED STATES OF AMERICA)

Southern District of California) ss.

Southern Division)

I, STANLEY T. HOWE, Referee in Bankruptcy, in
and for the County of San Diego, State of California, in
and for said district, DO HEREBY CERTIFY, that the
foregoing is a true and perfect copy of Claim Sheet, in
the above entitled matter, as the same appears of record in
the proceedings in said matter now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my
hand this 1st day of June, 1938.

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 10 min.
past 12 o'clock Jun. 2, 1938 A. M. By M. J. Sommer,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER FIXING TIME FOR FIRST MEETING
OF CREDITORS.

IT IS HEREBY ORDERED that the 8th day of September, 1936, at the hour of 10:30 o'clock A. M., at the office of the undersigned, Referee, 506 United States National Bank Building, northeast corner of Second Avenue and Broadway, San Diego, California, be and the same is hereby fixed, as the time and place for the holding of the first meeting of the creditors of said bankrupt, and that notice to creditors of said meeting be published once in The San Diego Sun, and that creditors also be given ~~at least~~ Ten Days notice by mail of said meeting; all as provided by law.

San Diego, California, August 25, 1936.

STANLEY T. HOWE

Referee in Bankruptcy.

FILED August 25, 1936, at min. past 10:00
o'clock A. M. Stanley T. Howe, Referee M. L. Heaton,
Clerk.

CERTIFICATE

UNITED STATES OF AMERICA)
Southern District of California) SS
Southern Division)

I, STANLEY T. HOWE, Referee in Bankruptcy in
and for the County of San Diego, State of California, in
and for the said District, DO HEREBY CERTIFY that
the foregoing is a true and perfect copy of Order Fixing
Time For First Meeting of Creditors, in the above en-
titled matter, as the same appears of record in the pro-
ceedings in said matter now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my
hand this 1st day of June, 1938.

Stanley T. Howe

Referee in Bankruptcy

[Endorsed]: Filed R. S. Zimmerman, Clerk at 17 min.
past 12 o'clock, Jun. 2, 1938 A. M. By M. J. Sommer,
Deputy Clerk.

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[TITLE OF DISTRICT COURT AND CAUSE.]

NOTICE OF FIRST MEETING OF CREDITORS IN
PROCEEDINGS UNDER SECTION 74

No. 1048

To the creditors of LAMONT WILLIAM BOWMAN,
of the City of San Diego, in the County of San Diego,
abd District aforesaid:

Notice Is Hereby Given that on the 23rd day of May, 1935, the petition of said Lamont William Bowman praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under Section 74 of the Bankruptcy Act, was approved by this Court as properly filed under said section; and that the First Meeting of his creditors will be held at Room 404 Southern Title Building, 948 Third Ave., San Diego, California, on the 6th day of July, 1935 at 9:30 o'clock in the forenoon, at which time the said creditors may attend, prove their claims, nominate a trustee, examine the debtor, and transact such other business as may properly come before said meeting. San Diego, California, June 21, 1935.

J. A. ISAACSON,

Referee in Bankruptcy.

June 22, 1935.

[TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT OF PUBLICATION

STATE OF CALIFORNIA)

(SS.)

COUNTY OF SAN DIEGO).

Belva Adkins, being first duly sworn, deposes and says: That she is and was at all times mentioned herein over the age of 18 years and not interested as a party or otherwise in the above-entitled matter;

That she is the principal clerk of the printers and publishers of The San Diego Sun, a newspaper printed and published except Sunday, at the City of San Diego, County of San Diego, State of California; that as such principal clerk, she has at all times mentioned herein had charge of all advertisements published in said paper; That the notice of first meeting of creditors, a true and correct copy of which is hereto annexed, and made a part hereof, was published once in said newspaper, to-wit: On the 22nd day of June, 1935, and that said publication was made in the newspaper proper and not in a supplement.

BELVA ADKINS

SUBSCRIBED AND SWORN BEFORE ME this
24th day of June, 1935.

(SEAL) MABEL L. HEATON
NOTARY PUBLIC IN AND FOR THE COUNTY
OF SAN DIEGO, STATE OF CALIFORNIA.

FILED: June 24, 1935, at 30 min. past 11:00 o'clock
A. M. J. A. ISAACSON, Referee, M. L. Heaton, Clerk.

CERTIFICATE

UNITED STATES OF AMERICA)
Southern District of California) ss.
Southern Division)

I, STANLEY T. HOWE, Referee in Bankruptcy, in
and for the County of San Diego, State of California, in
and for the said district, DO HEREBY CERTIFY that
the foregoing is a true and perfect copy of Notice of
First Meeting of Creditors in proceedings under Section
74 and affidavit of Publication thereof in the above en-
titled matter, as the same appears of record in the pro-
ceedings in said matter now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my
hand this 1st day of June, 1938.

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman Clerk at 16 min.
past 12 o'clock Jun. 2, 1938 A. M. By M. J. Sommer,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

Pursuant to the Application of J. EARL HASKINS,
one of the attorneys of record for appellant herein and
good cause therefore having been shown,

IT IS HEREBY ORDERED, that the following documents now on file in the office of the Honorable Stanley T. Howe, Referee, be certified by said Referee up to the Clerk of the above entitled court and that the same be included in the record upon this Appeal:

1. Referee's Judgment Docket of Claimants.
2. Order fixing date of first meeting of creditors, with affidavit of publication thereon.
3. Notice of first meeting of creditors, under date of June 22, 1935, with affidavit of publication.

IT IS FURTHER ORDERED, that said documents be made a part of the record upon this Appeal and that this Order be included in the transcript upon this Appeal.

Paul J. McCormick
District Judge.

DATED: May 27th, 1938.

[Endorsed]: Filed R. S. Zimmerman Clerk at 14 min.
past 2 o'clock May 27, 1938 P. M. By M. J. Sommer,
Deputy Clerk.

At a stated term, to wit: The January term, A. D. 1936, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court-room thereof in the City of San Diego, on Friday, the 15th day of May, in the Year of our Lord, 1936.

PRESENT:

The Hon. Leon R. Yankwich, District Judge.

In the Matter of)

LAMONT WILLIAM BOWMAN,) No. 1048 - Bkcy.

Debtor.)

This matter coming on for Hearing on Referee's Certificate on Petition for Review, pursuant to notice by debtor filed May 7, 1936, J. Earl Haskins, Esq., appearing as counsel for debtor, and Attorney Noon, for Martin Loperena, et al; Order of Referee of July 26, 1935, is reviewed and this matter is referred to the Referee herein for further proceedings.

[TITLE OF DISTRICT COURT AND CAUSE.]

SUPPLEMENTAL PROPOSAL FOR EXTENSION.
IN PROCEEDINGS FOR A COMPOSITION
OR EXTENSION

Leave of Court first having been had and obtained, comes now the petitioner, Lamont William Bowman, petitioning debtor herein, and presents the following supplemental proposal for the payment of his obligations, to the Honorable Stanley T. Howe, Referee in Bankruptcy, of the District Court of the United States, for the Southern District of California, Central Division, which proposal your petitioner represents is for the best interests of all of his creditors.

Your petitioner further represents that he is now and has been for the past fourteen (14) years conducting a drug and pharmacy business at the location known as 1538 Market Street, San Diego, California;

That on or about the 25th day of March, 1925, he purchased for the sum of Thirty thousand (\$30,000.00) Dollars, the premises known as 1538 Market Street, San Diego, California, the legal description of which is:

LOTS 7 and 8, Block 2, Sherman's Addition, according to Map thereof, No. 856, filed in the office of the County Recorder of San Diego County, February 18, 1899; said records being in the City of San Diego, County of San Diego, State of California;

and that, at the same time and as a part of the same transaction, a Deed of Trust was executed in favor of

the Union Trust Company of San Diego, as Trustee, with Martin Loperino, et al., named therein as Beneficiaries;

That thereafter payments were made on the aforesaid obligation reducing the principal amount thereof to the approximate sum of Eleven thousand seven hundred (\$11,700.00) Dollars, which amount it is now alleged by the said Loperinos is past due and payable;

Petitioner further states that there has been expended in the improvements of the property covered by the aforementioned Deed of Trust an additional sum in excess of Six thousand (\$6,000.00) Dollars;

Petitioner further states *the* the said Loperinos have caused a Notice of Default to be recorded and that the said Union Trust Company has been instructed to sell said property in accordance with the provisions of said Deed of Trust;

Petitioner further states that all the payments made upon the aforementioned obligation, together with the additional improvements thereon, have been made from and out of the conducting of the drug and pharmacy business at the aforementioned location.

Petitioner further states that he owns another parcel of real property satisfactorily leased in the City of San Diego of the reasonable value of Seven thousand five hundred (\$7500.00) Dollars, upon which there is an encumbrance of approximately Three thousand three hundred (\$3300.00) Dollars, and that your petitioner has an

equity therein which could be reduced to cash in a sum in excess of Three thousand (\$3000.00) Dollars;

Your petitioner further states that the net income from his drug and pharmacy business at the present time is in excess of Two hundred and fifty (\$250.00) Dollars per month and your petitioner further represents that, with the improvement in conditions generally, his net income should be increased to a sum of approximately Five hundred (\$500.00) Dollars a month;

Your petitioner further represents that there are apartments and a residence on the property covered by the said Deed of Trust to the Loperinos, the income from which is now in the sum of approximately Seventy-five (\$75.00) Dollars per month and your petitioner further represents that said income should be steady and continued at the same or a better amount.

Petitioner further states that all of his creditors, with the exception of the Loperinos, have consented to the extension as proposed, and have agreed to consent to the terms thereof. That the secured obligation in favor of the Loperinos represents an amount greater than fifty (50%) per cent of all the obligations of petitioner; that Loperinos have refused to join in or to acquiesce in said proposed extension, but insist that a sale be had under said Deed of Trust; that a majority in number of creditors consent to said extension proposal;

Your petitioner herewith presents for the approval of this Honorable Court, the following plan for the payment of his obligations to his creditors:

(1) Payment to Martin Loperino, et al., on account of the Note secured by the Deed of Trust upon the real property heretofore described, the sum of One hundred (\$100.00) Dollars per month; said payments to be first applied to any unpaid interest and the remaining amounts to be applied on principal; said payments to continue for a period of one year, at which time this Honorable Court may make a new and additional order if conditions so warrant.

(2) Payment of the sum of Fifty (\$50.00) Dollars per month to the Brunswig Drug Company; said payments to be first applied on interest and any portion remaining to be applied on principal; said payments to continue for a period of one year thereafter; said order to be subject to modification by the above entitled Court.

(3) The obligation of Fourteen hundred (\$1400.00) Dollars due to the Security Trust & Savings Bank of San Diego, San Diego, California, to remain in its present form; said Bank to receive a portion of the income being derived from the lease of said premises.

(4) The obligation of Seventeen hundred (\$1700.00) Dollars, due to Charles L. Sloan, to remain in its present form; said Charles L. Sloane to make any appropriate arrangement on account of the payments thereon with the Security Trust & Savings Bank of San Diego, California.

(5) Payment of the unsecured Note for Eight hundred (\$800.00) Dollars, formerly due to the Estate of Esmie McAuley, deceased, of which Ted Malone is Administrator, to be payable at the rate of Ten (\$10.00)

Dollars per month; said payments first to be applied to interest and any remaining portion to be applied upon principal; the same to continue for a period of one year, thereafter to be subject to the further order of this Court.

(6) Payment of Fifty (\$50.00) Dollars per month on unpaid taxes.

WHEREFORE, your petitioner prays that it be adjudged and decreed that the aforementioned proposal is for the best interests of each and all of the creditors of said petitioner and your petitioner further requests that an Order be made confirming the same.

Lamont William Bowman
Petitioner.

J.. Earl Haskins
Attorney for Petitioner.

[Endorsed]: Filed R. S. Zimmerman Clerk at 45 min.
past 1 o'clock, Sep. 24, 1936 P. M. By F. Betz, Deputy
Clerk.

At a stated term, to wit: The February Term, A. D. 1936, of the District Court of the United States of America, for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 21st day of August in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable Albert Lee Stephens, District Judge.

IN THE MATTER OF ADJUDICATIONS)
AND ORDERS OF REFERENCE IN)
BANKRUPTCY)

The court having duly considered the Petitions in Bankruptcy filed and having determined that all the conditions prescribed by law have been complied with, and that adjudications in bankruptcy should be made; it is hereby ordered that the Clerk make and sign Orders of Adjudication and Reference to the Referee in the cases numbered and entitled as follows:

* * * *

(14 cases herein)

* * * *

and the Court having duly considered the Certificate of the Referee recommending that the debtor be adjudged bankrupt, it is hereby ordered that the Clerk make and sign Order of Adjudication and Reference in the following case:

[TITLE OF DISTRICT COURT AND CAUSE.]

ADJUDICATION

and

ORDER OF REFERENCE (UNDER SECTION 74)

At Los Angeles, in said District, on August 21, 1936, before said Court in Bankruptcy, the certificate of the Referee recommending that LAMONT WILLIAM BOWMAN be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said LAMONT WILLIAM BOWMAN is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to STANLEY T. HOWE, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said Acts; and that the said Lamont William Bowman shall attend before said referee on August 28, 1936, at his office in San Diego, California, at 10 o'clock a. m. and shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

Witness the Honorable ALBERT LEE STEPHENS Judge of said Court, and the seal thereof at Los Angeles, in said District on August 21, 1936.

[Seal]

R. S. ZIMMERMAN,
Clerk.By R. B. Clifton,
Deputy Clerk.

[Endorsed]: Filed R. S. Zimmerman Clerk at 45 min.
past 11 o'clock, Aug. 21, 1936 A. M. By R. B. Clifton,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CERTIFICATE OF REFEREE ON DEBTOR'S
PETITION FOR EXTENSION.

On May 23, 1935 the debtor filed in this court a petition wherein he stated that he was unable to meet his debts as they matured and that he desired to effect a composition or an extension of time to pay his debts, under Section 74 of the Bankruptcy Act. Said petition was approved by the Court and the matter was referred to J. A. Isaacson, then Referee in Bankruptcy at San Diego, California, for further proceedings.

The debtor's schedules were filed on June 4, 1935.

On July 6, 1935 the debtor submitted, in writing, to this Court the plan that he proposed as the basis for an extension of time to pay his debts. This plan was that the debtor would pay, at the outset, the sum of \$160.00 per month to certain of his creditors; as follows:—

\$75.00 per month to Martin Loperena, and others, on account of a note of the debtor secured by a trust deed upon property at 1538 Market Street, San Diego, California, said payments to continue for a period of three years, and thereafter payments to be increased to \$100.00 per month;

\$75.00 per month to the Brunswick Drug Company, to continue for a period of two years, then payments to be increased to \$125.00 per month;

\$10.00 per month to be paid to Ted Malone until the debtor's obligation to him of \$800.00, with interest at 7% per annum, shall have been paid in full;

Obligations of the Security Trust & Savings Bank, of \$1400.00, and that of Charles L. Sloane, for \$1700.00, to remain in their then form.

On the same day, July 6, 1935, Mrs. Bouton, Gregorio Loperena, Martin Loperena, Jr. and Martin Loperena, filed their objection, in writing, to the granting of an extension to the debtor. Said objecting creditors are the owners of a note secured by a trust deed upon property described as Lots seven (7) and eight (8), in Block two (2), of Sherman's Addition, in the City of San Diego, California, said property being also known as and numbered 1538 Market Street, in said city. The amount unpaid upon the principal sum of said promissory note is \$11,750.00, and there is interest due thereon at 7% per annum from January 1, 1934. The taxes upon said property in the sum of \$780.98 are also unpaid by the debtor.

On July 2, 1935 the debtor was indebted to the Brunswick Drug Company in the sum of \$5213.70 as a balance due on a contract of purchase and sale between said Drug Company and the debtor for business and fixtures of the drug store operated by the debtor at 1538 Market Street, aforesaid. The amount now due to the Brunswick Drug Company on this indebtedness is not in the record, except that it is approximately \$5000.00.

Hearings were had on the issue thus joined, before the said Referee in Bankruptcy, J. A. Isaacson, and on July 26, 1935 he made an order denying the application of the debtor for an extension on the ground that the requisite

number of creditors had not consented to such an extension, and recommending that the debtor be adjudicated a bankrupt. A review was taken from this order of the Referee and on May 15, 1936 said order of the Referee was reversed and the matter was re-referred to me, as Referee in Bankruptcy, at San Diego, California, for further proceedings.

Hearings were had before me on July 14, 1936; July 29, 1936; August 1, 1936 and on August 8, 1936. At these several hearings the debtor appeared personally, represented by his counsel, J. Earl Haskins, with the exception of the hearing on July 29, 1936 whereat the debtor was represented by J. W. McInnis, of the firm of Wright, Monroe, Thomas & Glenn, as his attorney. Phyllis Bouton, Martin Loperena and Gregorio Loperena also appeared personally at said hearings, and were represented by Fred Noon, of the firm of Noon & Noon, as counsel. The Brunswig Drug Company appeared by its manager, C. F. McKay, and by Charles B. DeLong, its attorney. Charles C. Otis acted as shorthand reporter.

The objecting creditors, Martin Loperena, and others, had, previous to said hearings, commenced proceedings to foreclose the trust deed of the debtor hereinbefore described, and May 24, 1935 was fixed as the date of sale of said property to satisfy the amount due upon the obligation secured thereby. This court, however, enjoined the Trustee under said trust deed from proceeding with said sale and said injunction is still in force.

During the progress of the hearings before me the debtor proposed a second plan for an extension, which comprehended the payment of \$210.00 per month by the debtor to and for the benefit of the creditors already mentioned. Under this plan the debtor proposed to pay the sum of \$160.00 per month to said creditors, as before recited, and an additional sum of \$50.00 per month to be applied on the back taxes on the property covered by the Loperena trust deed. No formal proposition was submitted, however, but the debtor at the last hearing before me asked leave to file a formal proposal outlining that proposition at a later date.

From the testimony and evidence offered to and received by me, I HEREBY CERTIFY as follows:—

The debtor is not a wage-earner or farmer but is the proprietor, manager and operator of a drug-store located at 1538 Market Street, San Diego, California.

The books and records of the debtor show that for the period January 1, 1936 to June 30, 1936 the total receipts from the business of the debtor were \$10,742.98, and the total disbursements of the debtor during the same period were \$10,980.74, a deficiency of receipts to meet disbursements of \$237.76.

The methods by which the debtor expects to be able to make payments to his creditors under the plan, or plans, submitted by him are an anticipated improvement in his drug-store business; the liquidation of old debts on which it is claimed payments are being made at this time; an

anticipated decrease in the amount that the debtor would be compelled to pay to his wife, Dorothy Bowman; and a return from rentals of certain living apartments over his drug-store at 1538 Market Street, San Diego, California, which rentals, it is claimed, would amount to about \$75.00 per month.

Since the commencement of these proceedings the debtor has leased the property described in his schedules as Lots one (1) and the north half of Lot two (2), Block seventeen (17), of Culverwell's Addition, in said City of San Diego, and this lease has been assigned by the debtor to the Security Trust & Savings Bank to be retained by it until the indebtedness of the debtor to said Bank has been liquidated. The rental under this lease is approximately \$500.00 per annum.

The debtor has been required by the Superior Court of the State of California, in and for the County of San Diego, to pay to his wife the sum of \$50.00 per month, and the sum of \$250.00 to her attorney for his fee in certain litigation between the debtor and his said wife. The sum of \$100.00 only has been paid on said attorney's fee and the remainder thereof, \$175.00, is unpaid.

The debtor had arranged to pay the taxes on the property at 1538 Market Street, San Diego, California, under the ten-year payment plan as provided by the Legislature of the State of California, but did not make the payments thereon, and the taxes on said property since the year 1933 have not been paid.

The debtor has paid nothing on the Loperena obligation since the commencement of these proceedings, and the record does not disclose what has been paid, if anything, on the Brunswig Drug Company obligation during that period.

From the foregoing I conclude that the proposal, or proposals, submitted by the debtor does not, and do not, include an equitable and feasible method of liquidation for secured creditors whose claims are affected by these proceedings, and that the proposal, or proposals, submitted is not and are not for the best interests of all creditors. The objecting creditors, Martin Loperena, and his co-payees, have not accepted any proposal made by the debtor, and they represent more than half the total indebtedness of the debtor, as shown by his schedules.

I therefore recommend that the proposal or proposals of the debtor for an extension under Section 74 of the Bankruptcy Act be not confirmed, and that the debtor be adjudicated a bankrupt.

Dated August 19, 1936.

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman Clerk at 54 min.
past 10 o'clock Aug. 21, 1936 A. M. By R. B. Clifton,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

STATEMENT OF REFEREE ON PETITION OF
DEBTOR FOR REVIEW.

In this matter, on May 23, 1935, the debtor filed a petition which forms the basis for an application by him for an extension of time to pay his debts under Section 74 of the Bankruptcy Act. Hearings have been had before the undersigned Referee in Bankruptcy on said petition and thereafter, on August 19, 1936, I prepared and forwarded to your Honorable Court my certificate as to the proceedings had before me in the premises and my recommendation that the proposals or proposals of the debtor for an extension under Section 74 of the Act be not confirmed but that the debtor be adjudicated a bankrupt.

Pursuant to said certificate and recommendation the bankrupt was adjudicated on August 21, 1936 and said matter was referred to me as Referee in Bankruptcy.

Thereafter, and on August 28, 1936 the debtor, through his attorney, J. Earl Haskins, filed with me a petition for a review, said petition referring to said certificate and recommendation of the Referee and alleging that the evidence submitted before me in this matter is insufficient to support said certificate and recommendation and is furthermore insufficient to warrant an adjudication of the debtor as a bankrupt; also that said certificate and recommendation violates Section 74, subsection 2, subdivision E of the Bankruptcy Act, as amended, and Sec-

tion 74; Subdivision L of said Act. There was filed with said petition for review a copy of a supplemental proposal for extension.

By said review the petitioner seeks to secure a reversal of the order denying the confirmation of the debtor's supplemental proposal for extension, as is set forth in the prayer of said petition. He also asks that he receive all that he has lost by reason of the alleged erroneous order made denying said confirmation.

Said petition for review, with the supplemental proposal for extension which is made a part thereof, is herewith returned to your Honorable Court without a statement and certificate on review for the reason that the undersigned, as Referee in Bankruptcy, has made no order the review of which is sought in this proceeding by the debtor.

I have mailed a copy of this statement to J. Earl Has-
kins, attorney for the debtor; and to Fred Noon and
Charles B. DeLong, attorneys for creditors who have
appeared in this proceeding.

Respectfully submitted,

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman Clerk at 45 min.
past 1 o'clock Sep. 24, 1936 P. M. By F. Betz, Deputy
Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PETITION OF DEBTOR FOR REVIEW OF
REFEREE'S ORDER
IN PROCEEDINGS FOR AN EXTENSION

Your *petition* is the debtor named in the above proceedings, and as such was a party to the proceedings had in said matter on the 8th day of August, 1936, wherein this petitioner filed an amended petition and supplemental proposal for an extension of time in which to pay his debts, and waived specifically all matters in composition thereof:

That said matter was duly and regularly heard before Stanley T. Howe, Referee in Bankruptcy of the above entitled court.

That said referee did on August 19th, 1936, make his order as follows:

"I therefore recommend that the proposal or proposals of the debtor for an extension under Section 74 of the Bankruptcy Act be not confirmed, and that the debtor be adjudicated a bankrupt".

To which order petitioner duly accepted.

Said Order is erroneous in this:

- (1) That the evidence before the court is not sufficient to support the order of the court, and that the order made violates the purview of Sec. 2, Section 74, subdivision (e) as amended, in that the debtor may submit a proposal for an extension including a feasible

method of financial rehabilitation for the debtor which is for the best interest of all the creditors, including an equitable liquidation for the secured creditors whose claims were affected.

(2) That the evidence before the court is not sufficient to adjudge the debtor a bankrupt, and violates that portion of Section "L", towit, "the court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy; or if the confirmation of his proposal has been denied.

That a statement of the supplemental proposal for extension is hereunto attached, and made a part of this Petition for Review.

WHEREFORE, petitioner prays that the order denying the confirming of debtor's supplemental proposal be reversed, and that he receive all that he has lost by the erroneous order heretofore made.

Dated this 27th day of August, 1936.

LAMONT WILLIAM BOWMAN
Debtor

by J Earl Haskins

J. EARL HASKINS

Attorney for Petitioner

[Endorsed]: Filed Aug. 28, 1936 at 9 o'clock A. M.
Stanley E. Howe, Referee M. R. Heaton, Clerk. Filed
R. S. Zimmerman, Clerk at 45 min. past 1 o'clock Sep.
24, 1936 P. M. By F. Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PETITION FOR REHEARING

COMES NOW Lamont William Bowman, the debtor herein, and respectively prays that the Debtor's Amended Petition for Extension in said cause be reheard and reconsidered for the following reasons:

I

That there was a manifest misapprehension on the part of the Court as to the law applicable in said case.

II

That there was a mistake on the part of the Court in applying the law to the actual, appurtenant facts in the case.

III

That the Court recommended that an erroneous order be made by the Honorable District Court that debtor be declared a bankrupt in that:

- (1) That the evidence before the court is not sufficient to support the order of the court, and that the order made violates the purview of Sec. 2, Section 74, subdivision (e) as amended, in that the debtor may submit a proposal for an extension including a feasible method of financial rehabilitation for the debtor which is for the best interest of all the creditors, including an equitable liquidation for the secured creditors whose claims are affected.

(2) That the evidence before the court is not sufficient to adjudge the debtor a bankrupt, and violates that portion of Section "L", to-wit, "the court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy; or if the confirmation of his proposal has been denied."

IV.

That the Court has overlooked the facts as set forth in the evidence that debtor has sufficient assets to pay the obligations as proposed in his extension proposal aside from the income which is being derived monthly from the debtor's business and from the further fact that the percentage of profit from the business conducted by the debtor is sufficient to pay the amount proposed for the granting of the extension proposal.

V

That the Court has failed to apply the maxim and purpose of Section 74 of the Bankruptcy Act and that a full statement of the facts as presented by the evidence in the matter will establish that there is no basis for the order recommended by the court in denying the proposed extension and adjudicating the bankrupt.

WHEREFORE, your petitioner prays for the reasons hereinbefore set forth that the decree and order of the Court be vacated and the said cause be reheard and re-considered.

Respectfully submitted,

Lamont William Bowman

Petitioner

by J Earl Haskins

J. EARL HASKINS,

Attorney for Petitioner.

We hereby certify that the foregoing petition is, in our opinion, well founded in law and should be granted and is not interposed for the purpose of delay.

J Earl Haskins

[Endorsed]: Filed R. S. Zimmerman, Clerk at 43 min.
past 4 o'clock, Sep. 10, 1936 P. M. By R. B. Clifton,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NOTICE OF MOTION FOR ORDER TO SET-
ASIDE AND VACATE ORDER ADJUDICAT-
ING DEBTOR A BANKRUPT, and to DISMISS
THE PROCEEDINGS WITHOUT PREJUDICE

* * * * *

IN PROCEEDINGS FOR AN EXTENSION

* * * * *

TO Martin Loperena, Gregoria Loperena, Martin J. Loperena and Phyllis Bouton, and to their *at* attorneys, Noon & Noon, Esqs.; Mary McAuley, Rose McCurdy, Cassie Madigan and Dan McAuley, heirs of the Estate of Esmie McAuley, also known as Esmie Malone, Deceased, and to their attorney, Henry I. Dockweiler, Esq., Brunswig Drug Company, a corporation, and their attorney, Charles B. DeLong, Esq.; Security Trust & Savings Bank of San Diego, of San Diego, California; Charles L. Sloane of San Diego, Calif:

YOU, and EACH OF YOU WILL PLEASE TAKE NOTICE that on the 16th day of October, 1936, in the Court Room of the United States District Court in the Federal Building in the City of San Diego, California, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, Lamont William Bowman, through his counsel, will move this court for its order vacating and setting aside the Order of the Honorable Albert Lee Stephens of August 21, 1936, adjudicating Lamont William Bowman a bankrupt, and for its further Order dismissing this proceeding and action without prejudice to re-filing.

Said Motion will be based upon the following grounds:

- (1) That the Honorable Referee in Bankruptcy hearing said matter erred as a matter of law by his failure and neglect to carry out the former Order of this Court as contained in the Order of Honorable Leon R. Yankwich under date of 15th day of May, 1936, to which reference is hereby made for full and further particulars.
- (2) That the Honorable District Judge Albert Lee Stephens acted pre-maturely, and therefore in excess of the jurisdiction of this court, by making his Order Adjudicating Lamont William Bowman, a bankrupt; to the prejudice of said Lamont William Bowman, without giving or permitting said Lamont William Bowman an opportunity to submit amendments for approval and incorporation in the summary of evidence, all of which amendments would have covered material facts introduced in evidence at the various hearings had on said proposal for extension before the Honorable Referee in Bankruptcy.
- (3) That the Honorable Referee in Bankruptcy committed fatal error, to the prejudice of this debtor, by the failure of said referee either to deny or confirm said extension proposal, and that by the failure of said referee to make his Order thereon, a Petition for Review of Referee's Order is unavailing, for the reason that there is no Order of the said Referee to review; that debtor's only remedy was by a Petition for Re-hearing from Order adjudicating debtor a bankrupt, and that by such a proceeding it is impossible to review the evidence upon a referee's certificate.

(4) That the Honorable Referee further erred as a matter of law and in excess of authority granted to him by acting as a Special Master without first having been appointed to act in said capacity.

(5) That this Honorable District Court is now estopped and precluded from the usual presumption in favor of the validity of a referee's order when the certificate does not contain a summary of the evidence, for the reason that there is no competent certificate of any description whatsoever by any referee before this Honorable District Court for its consideration.

(6) That by making the recommendation, there was a manifest mis-apprehension on the part of the court (referee) as to the law applicable in said case.

(7) That in making said recommendation, the referee erred in applying the law to the actual and material facts in the case.

(8) That the evidence introduced, heard and considered by the Honorable Referee in Bankruptcy is wholly insufficient to support the Order of the court adjudicating debtor a bankrupt, and that the findings made by the referee in a certificate of recommendation violate and controvert the true purport of Section 74 of the Bankruptcy Act, and particularly Subdivision E thereof, as amended June 7, 1934, C 424 Par. 2 (11 USCA Par 202).

(9) That the evidence introduced, heard and considered by the Honorable Referee is wholly insufficient to support an implied finding that Section "L" of said Sec-

tion 74 had been violated by the said debtor, but on the contrary evidence was introduced and uncontroverted that debtor had materially placed a majority in number of his creditors, both secured and unsecured, in such a financial position that their claims would be liquidated if an extension proposal ~~had~~ been granted.

(10) That there is no evidence before the court that debtor is insolvent and that his obligations exceed his assets, but on the contrary the evidence introduced, heard and accepted by the court on said hearings for confirmation of said extension proposal, as amended, establish that the monthly income of the business of debtor is in excess of monthly liabilities of the cost of operation thereof by a margin of \$250.00 per month; that additional income is available monthly from rentals from the property in which debtor conducts his business to the extent of \$75.00; that the debtor has other property from which \$3,000 to \$4,000 in cash could be raised, if for any reason, debtor should not have sufficient funds from his business to pay in full monthly all the terms and conditions of said amended extension proposal; that the objecting creditor is secured by a parcel of real property in which debtor conducts his business, and that the value of the security is far in excess of the obligation thereon; that the interests of all of the other creditors will be seriously impaired, and as to the unsecured creditor, will be fatal, if said amended extension proposal is not confirmed, and that the amended proposal is a sound and feasible method plan for financial rehabilitation of the debtor.

(11) That it is not possible for the debtor to comply with General Order in Bankruptcy No. 27 as to procedure for the reason that a person desiring a review shall file his petition therefor, setting out the order complained of, a summary of the evidence relating thereto and the finding and order of the referee, and since no order was ever made by said referee and there is no summary of the evidence, a review is impossible.

That in addition to this Notice of Motion, said motion will be made and based upon all of the files and papers in this action; upon all of the files and papers in this case in the hands of the referee in Bankruptcy, Hon. Stanley T. Howe, and upon the affidavits of Lamont William Bowman, and J. Earl Haskins, hereunto attached and made a part of this motion.

WHEREFORE, Petitioner, Lamont William Bowman, prays, that the motion be granted vacating and setting aside the Order of Adjudication heretofore made on August 21, 1936, and that this Honorable Court make its Order dismissing the entire proceeding without prejudice to re-filing.

Dated this 8th day of October, 1936.

J. Earl Haskins

J. Earl Haskins,

Attorney for Debtor, Lamont William Bowman

[Endorsed]: Filed R. S. Zimmerman Clerk at 3 min.
past 12 o'clock Oct. 14, 1936 P. M. By R. B. Clifton,
Deputy Clerk.

At a stated term, to wit: The July term, A. D. 1936, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court-room thereeof in the City of San Diego, on Friday the 16th day of October, in the Year of our Lord, 1936.

PRESENT:

The Hon. Paul J. McCormick, Judge of the District Court.

In the Matter of)

Lamont William Bowman,) No. 1048 - Bkcy.
)
 Bankrupt)

This matter coming before the Court for:

1. Hearing on Motion of Martin Loperena, et al, for the Court to Hear and determine the objection to the bankrupt's petition for re-hearing, etc., pursuant to notice filed September 30, 1936;
2. Hearing on Motion of bankrupt, to Vacate and set aside Order adjudicating debtor a bankrupt and to dismiss proceedings without prejudice pursuant to notice filed October 14, 1936.

J. Earl Haskins, Esq., appearing as counsel for the bankrupt and Attorney Noon, appearing for Martin Loperena, et al; at 2:05 o'clock P. M., counsel answered ready, J. Earl Haskins, Esq., makes a statement; Attorney

Noon makes a statement, whereupon the matter of the Review of the purported order of the Referee dated August 19th, 1936, now coming regularly before the Judge of the Court, and it appearing that the Referee herein has failed to make any order in compliance with said order of re-reference, and has also failed to send up or transmit a Summary of the Evidence as required by the General Orders in Bankruptcy,

It is Now Ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this Court entered May 15th, 1936 be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an Order or orders thereon pursuant to provisions of the National Bankruptcy Act and all amendments thereto and the General Orders in Bankruptcy, and it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74¹ entered on August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof.

[TITLE OF DISTRICT COURT AND CAUSE.]

SUPPLEMENTAL PROPOSAL FOR EXTENSION
OF TIME TO PAY DEBTOR'S OBLIGATIONS
UNDER DATE OF DECEMBER 11, 1936.

IN PROCEEDINGS FOR A COMPOSITION OR
EXTENSION

IT APPEARING that the Honorable Paul J. McCormick, District Judge of the above entitled Court at a hearing held on the 16th day of October, 1936, at the Courthouse at San Diego, California, re-referred the matter of Lamont William Bowman, Debtor, No. 1048, in Bankruptcy back to the said Referee in Bankruptcy with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental petition by said debtor for said extension, and to make any orders appropriate thereon, and

IT FURTHER APPEARING that the matter was set for hearing before the Honorable Stanley T. Howe, Referee in Bankruptcy of said Southern Division of said Court on the 24th day of November, 1936, and that the same was then and there continued for hearing to the date of December 8, 1936, and was again continued for hearing to the date of December 11, 1936, and

IT FURTHER APPEARING that the aforementioned Debtor, Lamont William Bowman, has obtained consents of all of his creditors approving this supplemental proposal for extension with the exception of the creditor Martin Loperena, Gregorio Loperena, Martin J. Loperena, and Phyllis Bouton, which creditor owns a secured encumbrance against the building in which this Debtor conducts his business, and

Your petitioner further represents that he is now and has been for the past fourteen (14) years conducting a drug and pharmacy business at the location known as 1538 Market Street, San Diego, California;

That on or about the 25th day of March, 1925, he purchased for the sum of Thirty Thousand (\$30,000.00) Dollars, the premises known as 1538 Market Street, San Diego, California, the legal description of which is:

Lots 7 and 8, Block 2, Sherman's Addition according to Map thereof, No. 856, filed in the office of the County Recorder of San Diego County, February 18, 1899; said records being in the City of San Diego, County of San Diego, State of California;

and that, at the same time and as a part of the same transaction, a Deed of Trust was executed in favor of the Union Trust Company of San Diego, as Trustee, with Martin Loperena, et al., named therein as beneficiaries;

That thereafter payments were made on the aforesaid obligation reducing the principal amount thereof to the approximate sum of Eleven Thousand Seven Hundred (\$11,700.00) Dollars, which amount it is now alleged by the said Loperinos is past due and payable;

Petitioner further states that there has been expended in the improvements of the property covered by the aforementioned Deed of Trust an additional sum in excess of Six Thousand (\$6,000.00) Dollars;

Petitioner further states that the said Loperinos have caused a Notice of Default to be recorded and that the said Union Trust Company has been instructed to sell said property in accordance with the provisions of said Deed of Trust;

Petitioner further states that all the payments made upon the aforementioned obligation, together with the additional improvements thereon, have been made from and out of the conducting of the drug and pharmacy business at the aforementioned location.

Petitioner further states that he owns another parcel of real property satisfactorily leased in the City of San Diego of the reasonable value of Seven Thousand Five Hundred (\$7,500.00) Dollars, upon which there is an encumbrance of approximately Three Thousand Three Hundred (\$3,300.00) Dollars, and that your petitioner has an equity therein which could be reduced to cash in a sum in excess of Three Thousand (\$3,000.00) Dollars;

Your petitioner further states that the net income from his drug and pharmacy business at the present time is in excess of Two Hundred and Fifty (\$250.00) Dollars per month and your petitioner further represents that, with the improvement in conditions generally, his net income should be increased to a sum of approximately Five Hundred (\$500.00) Dollars a month;

Your petitioner further represents that there are apartments and a residence on the property covered by the said Deed of Trust to the Loperinos, the income from which is now in the sum of approximately Seventy-five (\$75.00) Dollars per month and your petitioner further represents that said income should be steady and continued at the same or a better income.

Petitioner further states that all of his creditors, with the exception of the Loperinos, have consented to the extension as proposed, and have agreed to consent to the terms thereof. That the secured obligation in favor of the Loperinos represents an amount greater than fifty (50%) per cent of all the obligations of petitioner; that

Loperinos have refused to join in or to acquiesce in said proposed extension, but insist that a sale be had under said Deed of Trust; that a majority in number of creditors consent to said extension proposal;

Your petitioner herewith presents for the approval of this Honorable Court, the following plan for the payment of his obligations to his creditors;

(1) Payment in full of delinquent assessment, city, county, and state taxes on the property described as Lots 7 and 8, Block 2, of Sherman's Addition to the City of San Diego.

(2) Payment to the creditor, Martin Loperena, Gregorio Loperena, Martin J. Loperena, and Phyllis Bouton, on account of the note secured by the Deed of Trust upon real property heretofore described in the sum of One Hundred and Ten (\$110.00) Dollars per month, said payments first to be applied to any unpaid interest and the remainder thereof to be applied on principal.

(3) Payment of the sum of Fifty (\$50.00) Dollars per month to the Brunswick Drug Company, said payments to be first applied on interest and any portion thereafter remaining to be applied on principal.

(4) That the payment of any revenue under and by virtue of a lease upon Lot 1 and the North one-half of Lot 2, Block 17, Culverwell's Addition according to Map 143 thereof filed in the office of the County Recorder of said San Diego County be paid on account of a note Dated March 8, 1935, in the sum of Fourteen Hundred (\$1400.00) Dollars in favor of the Security Trust and Savings Bank of San Diego to be applied first toward the payment of any taxes and street assessments against said property, secondly any portion thereafter remaining to apply to

ward the payment of interest on said obligation, and any portion thereafter remaining to be applied on the principal of said obligation.

(5) That the obligation in favor of Charles L. Sloane in the sum of Seventeen Hundred (\$170.00) Dollars, which said obligation is represented by a note secured by a deed of trust dated April 12, 1935, and is also secured by said Lot 1 and the North one-half of Lot 2, Block 17, of Culverwell's Addition, be paid subsequent to the Security Trust and Savings Bank of San Diego.

(6) The unsecured Eight Hundred (\$800.00) Dollars note under date of September 11, 1934, in favor of the heirs of the estate of Esmie Malone, also known as Esmie McAuley, deceased, to be paid at the rate of Ten (\$10.00) Dollars per month, said payments first to be applied on interest and any portion thereafter remaining to be applied toward principal.

WHEREFORE, your petitioner prays that it be adjudged and decreed that the aforementioned supplemental proposal is for the best interests of all of the creditors of said debtor and that an order be made by this Honorable Court confirming said proposal extension.

Lamont William Bowman

J. Earl Haskins

Petitioning Debtor.

J. Earl Haskins & W. K. Brown

Attorneys for Debtor.

[Endorsed]: Filed Dec. 11, 1936 at 30 min past 10 o'clock A. M. Stanley T. Howe, Referee M. L. Heaton, Clerk Filed R. S. Zimmerman, Clerk at 42 min. past 11 o'clock Aug. 17, 1937 A. M. By F. Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER CONTINUING HEARING ON
SUPPLEMENTAL PETITION FOR EXTENSION

A hearing on the debtor's petition for extension, together with the petition filed herein supplemental thereto, having been set for November 24, 1936, at 2:00 P. M., notice of said hearing having been given by mail to the creditors of the debtor, and said hearing having been continued to December 11, 1936, at 10:00 A. M., and not being concluded on that day was continued to December 14, 1936, at 2:00 P. M., the debtor appearing personally and represented by J. Earl Haskins and W. K. Brown, his attorneys; Martin Loperena, Gregorio Loperena, and Phyllis Bouton, objectors herein, appearing personally and by Fred Noon, their attorney; the Brunswig Drug Company appearing by and through Charles B. DeLong, its attorney; and

It appearing to the Court that the Brunswig Drug Company, a corporation; Charles B. Sloane and the distributees of the estate of Esmie McAuley, deceased, creditors of the debtor, have in writing filed herein on December 11, 1936, consented that the supplemental petition of the debtor for extension be granted, but that Martin Loperena, Gregorio Loperena, Martin Loperena, Jr., and Phyllis Bouton, secured creditors of the debtor, whose claim represents a majority in amount of the claims of the creditors of the debtor, have objected to the granting of said extension, it being stipulated between counsel that the objection filed herein by said objectors on July 6, 1935, may be considered as having been filed against said supplemental petition; and

Evidence both oral and documentary having been submitted to the Court; and

It appearing to the Court that this matter should be continued for a period of three months in order that the feasibility of the debtor's proposed plan for extension may be ascertained; NOW, THEREFORE, IT IS

ORDERED that the hearing of the debtor's original petition, and supplemental petition, for extension be, and the same is hereby, continued to March 15, 1937, at 10:00 o'clock A. M.

IT IS FURTHER ORDERED that during the period of said continuance, the proposed plan for extension set forth in the debtor's supplemental petition for extension filed herein on December 11, 1936, be operative and effective for all purposes and in all particulars.

IT IS FURTHER ORDERED that the payment of \$110.00 per month to Martin Loperena, Gregorio Loperena, Martin J. Loperena, and Phyllis Bouton, secured creditors, proposed to be paid by the debtor in said supplemental petition for extension, shall be made to the credit of said persons at the main branch of the Security Trust & Savings Bank of San Diego, 904—5th Avenue, San Diego, California, the first of said payments of \$110.00 per month to be made in said manner on or before Saturday, December 19, 1936, and each subsequent monthly payment of \$110.00 shall be made to the credit of said persons at said Bank not later than the fifteenth day of each and every month commencing January 15, 1937, and continuing during the continuance of this order.

IT IS FURTHER ORDERED that the payments of \$50.00 per month to the Brunswick Drug Company, a cor-

poration, and the payment of \$10.00 per month to the heirs of Esmie Malone, also known as Esmie McAuley, deceased, as in said supplemental petition proposed, shall be made by the debtor not later than the first day of each and every month during the continuance of this order, and commencing January 1, 1937.

In addition to the foregoing the debtor shall pay all taxes and assessments of every kind and character that may accrue against the property of the bankrupt as and when they shall become due and payable, and shall, during the continuance of this order, make some payment on account of the delinquent assessments, city, county, and state taxes on the property described as Lots 7 and 8, Block 2, of Sherman's Addition, in the City of San Diego, California.

This continuance is granted on condition that the debtor pay the several amounts herein provided to be paid at the times and in the manner herein designated.

Dated: December 16, 1936.

Stanley T. Howe
Referee in Bankruptcy.

[Endorsed]: Filed Jul. 15, 1937 at 9 o'clock A. M.
Stanley T. Howe, Referee Filed R. S. Zimmerman, Clerk
at 42 min. past 11 o'clock Aug. 17, 1937 A. M. By F.
Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER CONTINUING HEARING PETITION
FOR EXTENSION

This being the time set for the further hearing of the debtor's original and supplemental petitions for extension, the debtor not appearing personally but being represented by W. K. Brown, his attorney; Gregorio and Martin Loperena, and Phyllis Bouton, appearing personally and by their attorney, Fred Noon; and the debtor, through his said attorney, asks that this matter be further continued in order that an action pending in the Superior Court of the State of California, in and for the County of San Diego, between the debtor and his wife, may be tried and determined before an order is made in the above-entitled matter determining the feasibility of the debtor's plan for extension; and objection being made to such continuance by Fred Noon but it appearing to the Court that a further continuance should be had; NOW,
IT IS

ORDERED that the hearing of the debtor's original and supplemental petitions for extension be, and the same hereby is, continued to May 20, 1937, at 10:00 a. m.

IT IS FURTHER ORDERED that during the period of this continuance the debtor comply strictly with all of the terms and conditions of the order made herein on December 16, 1936, making all the payments therein provided

for as though the terms of said order were repeated and reiterated in this order. This order may and shall be considered as a continuance and extension of all of the terms and conditions of said order of December 16, 1936, to May 20, 1937.

Dated: March 15, 1937.

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed Mar. 15, 1937 at 11 o'clock A. M.
Stanley T. Howe, Referee. M. L. Heaton, Clerk. Filed
R. S. Zimmerman, Clerk at 42 min. past 11 o'clock Aug.
17, 1937 A. M. By F. Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER DENYING PETITION FOR EXTENSION
AND OF CONFIRMATION OF PROPOSAL
THEREFOR.

A meeting of the creditors of the debtor having been regularly set for November 24, 1936, at 2:00 o'clock P. M., for the purpose of hearing the petition of the debtor for an extension herein, and his proposal therefor and supplements thereto; and the objections thereto filed by Gregorio Loperena, Martin Loperena, Martin Loperena, Jr., and Phyllis Bouton, secured creditors representing a majority in amount of the claims of creditors who would be affected by said extension; due notice of said meeting having been given in the manner required by law, and said meeting having been regularly continued from time to time until the 11th day of June, 1937, at 2:00 o'clock P. M., at which time the debtor appears personally and represented by J. Earl Haskins and W. K. Brown as his attorneys; the objecting creditors Gregorio Loperena and Phyllis Bouton appearing personally and by Fred Noon, their attorney; and the debtor at said time filing an additional supplemental proposal for an extension; and the said debtor's petition for an extension having been submitted to the Court upon all of the evidence and testimony heretofore admitted and taken in this matter; and

It appearing to the Court that the plan for extension proposed by the debtor hereon does not include an equitable

and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself, IT IS

ORDERED, that the petition of the debtor for an extension herein, and for confirmation of his proposals therefor, be, and the same are hereby, each and all denied.

Dated: June 14, 1937.

Stanley T. Howe

Referee in Bankruptcy.

[Endorsed]: Filed Jun. 14, 1937 at 11 o'clock A. M.
Stanley T. Howe, Referee, M. L. Heaton, Clerk. Filed
R. S. Zimmerman, Clerk at 42 min. past 11 o'clock, Aug.
17, 1937 A. M. By F. Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PETITION OF DEBTOR FOR REVIEW OF
RECOMMENDATION AND/OR ORDER
OF REFEREE
IN PROCEEDINGS FOR AN EXTENSION

Now comes the petitioning debtor, Lamont William Bowman, named in the above entitled proceedings and files this, his petition for review of all matters had in the above proceedings, and particularly a review of the recommendation of Stanley T. Howe, Referee in Bankruptcy of the above entitled Court, said recommendation bearing date of August 19, 1936, and the further order of the said Stanley T. Howe, Referee in Bankruptcy, under date of June 14, 1937, and of the matters and the whole thereof contained in said recommendation and order.

Your petitioner represents that there have been filed in the above entitled matter proposals and supplemental proposals for extensions of time in which this debtor may pay his obligations, and said debtor has in all of said proposals and supplemental proposals specifically waived composition thereof; that said proposals submitted have each and all had the consent and approval of a majority in number of creditors, but have failed to have the consent and approval of a majority in amount, for the reason that the objecting creditors, Martin Loperena, Gregorio Loperena, Martin J. Loperena and Phyllis Bouton, hold and own a secured encumbrance on the real property and store building, wherein this petitioning debtor conducts his drug and pharmacy business, the amount of which indebtedness to Martin Loperena, et al, is more than fifty per cent of the total indebtedness of your petitioning debtor.

Petitioner further represents that under date of August 8, 1936, there was filed an amended and supplemental proposal for extension of time, which proposal is hereunto attached and made a part of this petition for review, being referred to herein as Exhibit "A".

That thereafter a hearing was duly and regularly had upon said petition and the Honorable Stanley T. Howe, Referee in Bankruptcy, did on the 19th day of August, 1936, file with the Clerk of the District Court Certificate of Referee on Debtor's Petition for Extension and did in said Certificate "recommend that the proposal or proposals of the debtor for an extension under Section 74 of the Bankruptcy Act be not confirmed, and that debtor be adjudged a bankrupt."

That acting on said recommendation as aforesaid Lamont William Bowman, debtor herein, was adjudicated a bankrupt on August 21, 1936, by the Honorable Albert Lee Stephens, District Judge. That J. Earl Haskins, attorney of record for said petitioning debtor, was not served with a copy of said Certificate of Recommendation and did not, prior to said adjudication, have an opportunity to file affidavits on any supplemental proceedings whatsoever to question or controvert the authority of the referee to recommend bankruptcy under the provisions of Section 74 of the bankruptcy act, as amended; to which order or recommendation petitioner, duly excepted.

That thereafter at a hearing on review of the aforementioned recommendation of the Referee in Bankruptcy held before the Honorable Paul J. McCormick, District Judge, at San Diego, California, on the 16th day of October, 1936, the Honorable Court ordered the matter referred to the said Referee and the following minute order was therein duly made and entered:

"The matter of the Review of the purported order of the Referee dated August 19th, 1936, now coming regularly before the Judge of the Court, and it appearing that the Referee herein has failed to make any order in compliance with said order of re-reference, and has also failed to send up or transmit a Summary of the Evidence as required by the General Orders in Bankruptcy.

It is now Ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this court entered May 15th, 1936, be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an order or orders thereon pursuant to provisions of the National Bankruptcy Act and all amendments thereto and the General Orders in Bankruptcy, and it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof."

That thereafter further evidence was taken, introduced, and heard by the Honorable Referee in accordance with the order under date of October 16, 1936, and a supplemental proposal for extension of time under date of December 11, 1936; for debtor to pay his obligations was then and there filed, which said petition was duly and regularly heard and considered on December 14, 1936, a copy of said supplemental proposal being hereunto attached, made a part hereof and marked Exhibit "B".

That thereafter, to wit, December 16, 1936, the Honorable Referee of the above entitled Court made and entered

his order continuing a hearing on said supplemental petition for extension to the date of March 15, 1937, and did then and there approve temporarily the proposal of the said debtor as submitted, a true and correct copy of said order being hereunto attached, made a part hereof and marked Exhibit "C".

On said date of March 15, 1937, the Court made its further order continuing said matter for hearing until the date of May 20, 1937, a true and correct copy of said order being hereunto attached, made a part hereof, and marked Exhibit "D".

That thereafter said hearing under date of May 20, 1937, was duly and regularly continued to June 11, 1937, at which time said matter came on regularly for hearing; that petitioning debtor did then and there file an additional supplemental proposal materially enlarging the offers of payments heretofore proposed and made under the provisions of the order under date of December 16, 1936, a true and correct copy of said supplemental proposal being hereunto attached, made a part hereof, and marked Exhibit "E".

That at the termination of said hearing the Honorable Referee denied confirmation of any and all proposals heretofore made and in effect by the petitioning debtor, Lamont William Bowman, to which order petitioner duly excepted.

That thereafter on June 14, 1937, the Honorable Referee made and entered his written order denying confirmation of any and all proposals made, a true and correct copy of said order being hereunto attached, made a part hereof and marked Exhibit "F".

That within the time provided in General Order No. XXVII (Rule 84, United States District Court, Southern District of California) and within ten days after receipt of the order of said Referee denying confirmation petitioning debtor obtained the consent and order of the above entitled Court continuing the time to file a petition for review to on or before July 12, 1937. That on or about July 12, 1937, additional time was granted to petitioner to file said petition for review to July 15, 1937.

Petitioner respectfully submits to the Honorable Judge of the District Court the particulars wherein and whereby the recommendation of the Referee under date of August 19, 1936, and the order under date of June 14, 1937, were in error and respectfully requests the Honorable District Judge to review each, any and all matters pertaining to the aforesaid recommendation and to the aforesaid order:

I

That there was a manifest misapprehension by the said Referee as to the law applicable to the facts in said proceedings and the whole thereof.

II

That the Referee erred in applying the law to the material facts in said proceedings.

III

That the Referee erred by recommending that an order be made and entered by the District Judge that debtor be declared a bankrupt, in view of the evidence and facts presented to and before the said referee.

IV

That the evidence introduced and heard by the said Referee is wholly insufficient to support the order of the

Court and the implied finding that the petitioning debtor violated the purview of Section 74 of the Bankruptcy Act and particularly subdivision L thereof, C 424 Par. 2 (11 U. S. C. A. Par. 202), and particularly that debtor commenced or prolonged the proceedings herein for the purpose of delaying creditors and avoiding an adjudication in bankruptcy.

V

That the evidence introduced and heard by the said Referee is wholly insufficient to support the further order of the Court, and particularly that all of said proposals and amendments thereto:

- (1) Were not for the best interest of all creditors;
- (2) Were made for the purpose of delaying creditors;
- (3) That said proposals did not include an equitable and feasible method of liquidation for the secured creditor, Martin Loperena, et al;
- (4) That said proposals were not for the financial rehabilitation of the debtor herein;
- (5) That the assets and going business of said debtor were not and are not sufficient to pay all claims, both secured and unsecured.

VI

That the Referee further erred in precluding petitioning debtor in the introduction of evidence relative to the fact that the objecting creditor, Martin Loperena, as trustee, had been paid and received from this debtor the sum of One Thousand (\$1,000.00) Dollars, which said Martin Loperena had failed and refused to credit to the indebtedness claimed to be due and owing to Martin Loperena, Gregorio Loperena, Martin J. Loperena, and Phyllis Bouton, in the following particulars:

- (1) Objection to the introduction of any and all testimony by a duly authorized representative of the Security Trust & Savings Bank of San Diego, a corporation, showing deposit of One Thousand (\$1,000.00) Dollars in the account of Martin Loperena and precluding by objection other evidence tending to establish the fact of payment of the aforesaid sum, each and all objections to the introduction of evidence having been sustained by the said Referee, to which ruling petitioning debtor duly excepted;
- (2) Objection to the question propounded to the witness, Martin Loperena, at a hearing on said proceedings tending to establish payment to and receipt of said sum of One Thousand Dollars (\$1,000.00) from debtor to said Martin Loperena to which testimony an objection was duly and regularly made and thereupon sustained by said Referee, to which ruling petitioning debtor duly excepted;
- (3) That the Referee further erred in refusing to affirm supplemental proposal for extension under date of December 11, 1936, when it appeared that debtor had made any and all payments provided for thereunder to the said Martin Loperena; et al, in the sum of One Hundred Ten (\$110.00) Dollars per month, and in full compliance with the said order under date of December 16, 1936, hereinbefore referred to as Exhibit "C".

VII

That said Referee further erred in not considering the amended proposal for extension filed under date of June 11, 1937.

VIII

That the order of the Referee is not in accordance with the purview of Section 74 of the Bankruptcy Act, sub-division e thereof, as amended June 7, 1934, in that if the debtor fails to obtain the acceptance of a majority in number of all creditors whose claims are affected by an extension proposal representing a majority in amount of all creditors, the debtor may submit a proposal for an extension including a feasible method of financial rehabilitation for the debtor which is for the best interests of all the creditors including an equitable liquidation for the secured creditors whose claims are affected.

WHEREFORE, petitioner prays that all orders and all proceedings had in the above entitled matter be reviewed by the Honorable Judge of the District Court and that your petitioner receive and have all that he has lost by the erroneous order and recommendation heretofore made.

Dated: July 14th, 1937.

LAMONT WILLIAM BOWMAN

Debtor

By J. Earl Haskins

Attorney for Petitioners.

W. K. Brown

[Endorsed]: Filed Jul. 15, 1937 at 9 o'clock A. M.
Stanley T. Howe, Referee. Filed R. S. Zimmerman, Clerk
at 42 min. past 11 o'clock Aug. 17, 1937 A. M. By F.
Betz, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CERTIFICATE OF REFEREE ON PETITION
FOR REVIEW.

I, Stanley T. Howe, one of the Referees of said Court in Bankruptcy, do hereby CERTIFY:—

On June 14, 1937 I made an order, copy of which is hereto attached marked Exhibit "A", wherein I found that the plan for extension proposed by the debtor above-named did not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself, and denying the petition of the debtor for confirmation of said proposal.

An exception to this ruling was offered by the debtor, and entered.

The debtor, on July 15, 1937 filed herein his petition for review of said order on the following grounds:—

- (1) Misapprehension on the part of the Referee as to the law applicable to the facts;
- (2) Error of the Referee in applying the law to the material facts;
- (3) Error on the part of the Referee in recommending that the debtor be adjudicated a bankrupt;
- (4) Insufficiency of the evidence to support said order of the Referee;
- (5) Error on the part of the Referee in sustaining objections to the proposed introduction of evidence by the debtor;
- (6) Error on the part of the Referee in failing to affirm the supplemental proposal for extension of

the debtor of December 11, 1936, and in not considering the amended proposal for extension filed June 11, 1937;

- (7) That said order of the Referee is not in accordance with the purview of Section 74 of the Bankruptcy Act, subdivision "e" thereof.

The questions presented for review are, therefore:—

- (a) Is the evidence sufficient to support the order of the Referee denying the petition of the debtor for confirmation of his proposal for extension under Section 74 of the Bankruptcy Act; and
(b) Whether the Referee erred, as a matter of law, in denying said petition.

It will, perhaps, be helpful to the Court if a history of this matter is included within this certificate. For that reason only I submit the following:—

On May 23, 1935 the debtor filed in this Court a petition wherein he alleged that he was unable to meet his debts as they matured, and that he desired to effect a composition or tender a plan for extension of time to pay his debts under Section 74 of the Bankruptcy Act. Said petition was approved by the Court and the matter was referred to J. A. Isaacson, then Referee in Bankruptcy at San Diego, California, for further proceedings.

The debtor's schedules were filed on June 4, 1935.

On July 6, 1935 the debtor submitted, in writing, to this Court a plan that he proposed as the basis for an extension of time to pay his debts. This plan was, in

brief, that the debtor would pay at the outset some \$160.00 per month to certain of his creditors, as follows:—

- \$75.00 per month to Martin Loperena, and others, on account of a note of the debtor secured by a trust deed upon property at 1538 Market Street, San Diego, California, said payments to continue for a period of 3 years, and thereafter payments to be increased to \$100.00 per month;
- \$75.00 per month to the Brunszig Drug Company, to continue for a period of two years then payments to be increased to \$125.00 per month;
- \$10.00 per month to be paid to Ted Malone until the debtor's obligation to him of \$800.00, with interest at 7% per annum, should be paid in full.

Obligations of the debtor to the Security Trust & Savings Bank, of San Diego, California, in the amount of \$1400.00, and to Charles L. Sloane, for \$1700.00, were, by said proposal, to remain in their then form.

On July 6, 1935, Phyllis Bouton; Gregorio Loperena; Martin Loperena, Jr.; and Martin Loperena, filed their objection in writing to the granting of an extension to the debtor. Said objecting creditors are the owners of a note, secured by a trust deed upon property described as Lots 7 and 8, Block 2, of Sherman's Addition, in San Diego, California, said property being also known as and numbered 1538 Market Street, in said city, at which address the debtor is now, and was at that time, conducting a drug store known as the San Diego Pharmacy. The amount unpaid upon the principal sum of said note

is \$11,750.00, and there is interest thereon due at 7% per annum from January 1, 1934, less an amount of \$660.00 paid by the debtor under an order of this Court of date December 16, 1936. The taxes upon said property have not been paid for the years 1934-1935-1936.

On July 2, 1935 the debtor was indebted to the Brunswick Drug Company in the sum of \$5213.70 as a balance due, on a contract of purchase and sale between said Drug Company and the debtor for the business and fixtures of the drug store operated by the debtor at 1538 Market Street aforesaid. The amount now due to said Company on this indebtedness is not in the record except that it is approximately \$5,000.00.

Hearings were had on the issue thus joined before the said Referee in Bankruptcy, J. A. Isaacson, and on July 26, 1935 he made an order denying the application of the debtor for an extension on the ground that the requisite number of creditors had not consented to such extension, and recommending that the debtor be adjudicated a bankrupt.

A review was taken from this order by the debtor, and on May 15, 1936 said order of the Referee was reversed by this Court and the matter was re-referred to the undersigned, as Referee in Bankruptcy, for further proceedings.

Hearings were had before me on July 14, 1936; July 29, 1936; August 1, 1936 and on August 8, 1936. At these several hearings the interested parties appeared in person and were represented by counsel.

The objecting creditors, Martin Loperena and others, had, previous to said hearings, commenced proceedings to foreclose their trust deed upon said property, and May 24, 1935 was fixed as the date of sale of said property in said proceedings. This Court, however, enjoined the Trustee under said trust deed from proceeding with said sale, and said injunction is still in force.

A supplemental proposal for extension was filed by the debtor as of August 8, 1936, wherein he proposed to pay the sum of \$100.00 per month to the Loperenas, said payments to continue for one year; to Brunswig Drug Company \$50.00 per month, to continue for the same period; the obligations of the Security Bank and Charles L. Slqane to remain in their then form; to Ted Malone \$10.00 per month, to continue for one year; \$50.00 per month on unpaid taxes; a total payment of \$210.00.

On August 19, 1936 the undersigned Referee certified to the Court that the proposals submitted by the debtor did not include an equitable and feasible method of liquidation for secured creditors whose claims are affected by these proceedings, and that the proposals submitted were not for the best interests of all creditors; together with the recommendation that the proposals of the debtor for an extension be not confirmed and that the debtor be adjudicated a bankrupt. The debtor was thereupon adjudicated a bankrupt which adjudication has not been set aside.

A petition for review of this action of the Referee was filed and on October 16, 1936 said matter was re-

referred to the Referee, pursuant to order of the Court of that date, for further proceedings.

Since the re-reference of said matter as aforesaid hearings on the petition of the debtor for confirmation of his proposals for extension were had on December 8, 1936; December 11, 1936; December 14, 1936; March 15, 1937; May 20, 1937; June 3, 1937 and June 11, 1937. At all of these hearings the interested parties appeared in person and were represented by counsel.

On December 11, 1936 the debtor filed a third supplemental proposed plan for extension, in which he proposed to pay in full delinquent assessments and taxes on the property described as Lots 7 and 8, Block 2, Sherman's Addition; to Martin Loperena, and others, \$110.00 per month; Brunswig Drug Company \$50.00 per month; to Security Trust & Savings Bank, San Diego, all revenue from Lot 1 and the north half of Lot 2, Block 17, of Culverwell's Addition, in San Diego, until the obligation to said Bank of \$1400.00, should be paid in full, the obligation of Charles L. Sloane, in the amount of \$1700.00, secured by a trust deed upon said property, to be paid subsequent to such payment to said Bank; to pay to the heirs of Esmie Malone, deceased, the sum of \$10.00 per month until the obligation to them of \$800.00 should be paid in full.

On December 16, 1936 the Referee made an order requiring that the debtor pay to the Loperenas the sum of \$110.00 per month; \$50.00 per month to the Brunswig Drug Company and \$10.00 per month to the heirs of

Esmie Malone, deceased; also that the debtor pay all current taxes and assessments on the Market Street property and make some payment on the delinquent taxes thereon. This order was to remain in effect until March 15, 1937, when a further hearing would be had on the debtor's petition for an extension and confirmation.

On March 15, 1937 said order was continued in force to May 20, 1937 and further continuances thereof were granted up to June 11, 1937.

On June 11, 1937 the debtor filed a fourth supplemental proposed plan for extension in which two alternative proposals were set out. The first plan proposed the same payments as the third proposal, except that the proposed payment of taxes was altered. The alternative in this plan was to pay taxes in full by January 1, 1938 by the payment of \$140.00 monthly; and the payment of \$1,000.00 to an undesignated payee but presumably to the Loperenas, either in cash or credit, on or before January 1, 1938.

The undersigned Referee, as heretofore stated, on June 11, 1937 made his order denying the petition of the debtor for an extension and for confirmation of his proposals for extension.

SUMMARY OF THE EVIDENCE.

Witnesses:—

For the Debtor.

Lamont William Bowman, the Debtor.

Harold R. Conklin.

Howard Ritter.

For the Objecting Creditors.

Phyllis Bouton.

Martin Loperena.

Gregorio Loperena.

Fred Noon.

Paul Ward.

For the Brunswig Drug Company, a creditor.

C. F. McKay.

The following were received in evidence as exhibits:—

Debtor's Exhibit 1, Cash Book of the debtor for period from January, 1936 to and including June, 1936.

Objecting Creditors' Exhibit A, Settlement proposed by debtor under date of May 20, 1935.

" " Exhibit B, statement of delinquent city, state and county taxes up to December 31, 1936 on Market Street property.

" " Exhibit C, statement of 1936 taxes on said property.

The following papers and documents were submitted by the debtor but not received in evidence:—

Redemption receipt dated August 3, 1936 and marked paid same date, for delinquent street lighting assessment upon Lot 7, Block 2, Sherman's Addition; amount \$58.07.

Redemption receipt dated and marked paid same as above, for delinquent street lighting assessment upon Lot 8, Block 2, Sherman's Addition; amount \$11.56.

Cancelled check of L. W. Bowman, dated April 30, 1925, payable to Union Title Insurance Company, for \$4523.50; drawn upon First Trust & Savings Bank, San Diego.

The following cancelled checks, all drawn upon the Security Trust & Savings Bank, San Diego, signed by L. W. Bowman, and payable to said Bank:—

- No., dated April 1, 1931, for \$753.75.
- " 626; " July 3, 1931, for \$718.76.
- " 758, " October 5, 1931 for \$727.50.
- " 888, " January 6, 1932 for \$727.50.
- " 999, " April 1, 1932 for \$468.75.
- " 1105, " July 5, 1932 for \$464.37.

What purports to be an income statement of debtor for the period July 1, 1935 to July 1, 1936, inclusive.

What purports to be a cash book, used in debtor's business, for the period July 1, 1924 to and including June 30, 1925.

What purports to be a stub of the check-book of the debtor for the period November 15, 1924 to April 29, 1925.

It was stipulated on June 11, 1937 by counsel that all testimony and evidence heretofore offered and received should be considered as having been offered and received at that time.

After the filing of the petition for review in this matter a request was made by the Referee upon the debtor that

a transcript of the testimony in this matter be furnished to the Referee for use in the preparation of this summary. This request has not been complied with and, therefore, the following summary of the evidence is made from the notes of the Referee taken during the progress of the several hearings in this matter. The testimony at the various hearings in this matter was taken down by a shorthand reporter, Charles C. Otis, and his notes are available.

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LAMONT WILLIAM BOWMAN,
the debtor, testified substantially as follows:—

I am the debtor in this matter and operate a drug store at Sixteenth and Market Streets, San Diego, California. My receipts and disbursements in that business during the period indicated were as follows:—

1936.	Total Sales.	Disbursements.	Merchandise purchased, included in disbursements.
January	\$1792.95	\$2101.53	\$1337.21
February	1743.36	1743.66	1100.39
March	1896.30	1988.60	1461.47
April	1845.17	1850.68	1357.11
May	1694.89	1532.66	1151.29
June	1770.31	1763.61	1264.21
July	1920.63	1923.40	1408.30
August	1887.05	1890.25	1436.40
September	1770.00	1694.90	1171.51
October	1902.79	1864.01	
November	1897.99	1613.53	
	<hr/>	<hr/>	
	\$20121.44	\$19966.83	

I owe about \$5300.00 to the Brunswig Drug Company, which represents a balance due to it on a conditional sale contract for the drug store which I now operate. I owe the Loperenas, who are the objecting creditors herein, about \$13,000.00 on a trust note secured by trust deed on the real estate at 16th and Market Streets where my store is situated. My average income is \$2,000.00 per month, of which about 30% is profit. My expenses are about \$350.00 per month; I pay my wife \$50.00 per month and I propose to pay \$160.00 per month to my creditors leaving me \$40.00 a month for my own use.

On March 24 or 25th, 1925 I paid \$500.00 to the Union Title Company, \$1,000 to Martin Loperena to apply on account, and \$4523.50 to the Title Company later on for the Loperenas. I have made a search for the check of \$1,000 to Martin Loperena but have not been able to find it; it is lost but I have the check stub showing that payment. I have received no credit for that payment to Martin Loperena. All payments on the Loperena trust deed were made through the Bank with the exception of the \$1,000 to Martin Loperena and \$4500.00 to the Title Company.

The total hospital expense for Mrs. Bowman has been \$526.76

The property at 16th and Market Streets in which my business is conducted has quarters upstairs that can be rented. The rentals from such apartments are as follows:—July, 1936, \$57.50; August, 1936 \$57.50; September, 1936 \$34.00; October 1936 \$59.00; November, 1936 \$59.00. The rent for December, 1936 will be \$79.00.

While I keep no inventory I would estimate that my stock increased in value for the period January, 1936 to July, 1936 about \$1,000.00. I paid out during the same period about \$50.00 for furniture. I own property at Sixteenth and G Streets, San Diego, consisting of a lot 75 by 100 feet, which is leased as a service station for \$50.00 per month for the first five years and a minimum of \$50.00 per month for the next five years, with an agreement to pay me one cent a gallon for all gasoline sold over a certain number of gallons. The rental from this property is being paid directly to the Security Trust & Savings Bank to apply on my indebtedness to it of about \$1100.00 at the present time. I have owned this property for a considerable length of time and have lived in that neighborhood for thirteen or fourteen years. I am familiar with the value of that real estate. The property where the service station is located is worth \$7500.00, according to the Bank. I own no other property. I have got about \$100.00 in cash. I have made no arrangement to take care of the current taxes. I have paid all merchandise creditors to date, except the current accounts.

I am paying Mrs. Bowman \$50.00 a month now and am paying her attorney's fee as ordered by the Court. I have been paying the Brunswig Drug Company so much on account each month on its past-due account. The average monthly payment to the Brunswig Drug Company is \$50.00.

The original agreement with the Loperenas was to pay off the trust deed at the rate of \$500.00 every three months, plus the interest; also to keep taxes and other assessments on the premises paid. The last payment on principal was October 5, 1932, \$250.00, and the interest was paid up to April 1, 1934. No interest has been paid

on the Loperena trust note since April 6, 1934 and the balance remaining unpaid on the principal of this note is \$11,750.00.

Subsequent to the purchase by me from the Loperenas of the property at 16th and Market Streets I borrowed an additional \$3500.00 from them and executed to them a note therefor. I used this amount in improvement and remodelling of the building at 16th and Market Streets.

A demand was made upon me by the Union Trust Company for payment of the principal and interest on the Loperena trust deed note but I didn't go to the Title Company when that demand was made because Mr. Noon, as attorney for the Loperenas, wouldn't accept the terms I made to him of settlement. At one time at the Bank I offered to pay \$1000.00 but the only way the Loperenas would accept that money was for me to deliver a deed to the property to them and pay them \$150.00 a month for the property in addition. I made the offer set forth in Objectors' Exhibit A but finally withdrew it because the Loperenas wouldn't accept it.

The property at Sixteenth and Market Streets has been sold to the State of California because of unpaid taxes, and there is now due \$1085.84 delinquent taxes on that property since 1933. I haven't paid the taxes because I wanted to try to straighten out this matter. There are street assessments of approximately \$300.00 unpaid against the property. I have already paid about \$1,000.00 on the lighting assessment.

My wife and I are separated. The property I have mentioned is community property of my wife and myself. The property rights between my wife and myself have not been settled. A divorce proceeding has been pending

between us since July, 1935. Under the Court order I am supposed to pay my wife \$50.00 a month. It cost me about \$1,000.00 for support of myself and incidental expenses; such as lawyer's fees in this proceeding and the divorce action, during the past year.

I haven't paid the taxes on the Loperena property because I was hurt in an automobile accident and didn't know whether I would recover or not. I haven't made the payments on the Loperena obligation of principal and interest because it wouldn't be accepted by them. I bought this Loperena property in 1925 and have paid about \$28,000.00 on principal and interest on it. I remodelled the building on the property; restuccoed it at a cost of \$6,000.00. These improvements were made in 1929 or 1930. I have been paying Mrs. Bowman \$50.00 a month since July, 1935. I secured a restraining order to prevent her from taking anything out of the store, as I estimated she had been taking \$100.00 a month therefrom:

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PHYLLIS BOUTON,

one of the objecting creditors, testified in substance as follows:—

I went to the County Auditor's office and requested a statement of the delinquent taxes on the property occupied by Mr. Bowman at 16th and Market Streets. A statement was given to me at that time which I now identify as objecting creditors' exhibit B. I was advised that delinquent taxes on that property amounted to \$862.98 up to December 31, 1936. The taxes for 1936 amount to \$222.76. The statement therefor I identify as objecting creditors' exhibit C. Mr. Bowman has never

offered to pay any money to us that was refused. Mr. Bowman did offer in 1935 to deed the property over to us, and when he brought the taxes up to date and kept paying the \$100.00 a month, and we were satisfied, then we would deed the property back to him. Mr. Bowman didn't carry out the offer. We did accept that proposition but he didn't deed the property over to us nor did he make any payment of money. He deposited \$500.00 in the Bank in accordance with the offer but he drew it out because somebody told him he would be an idiot if he did that; that was the last we heard of that. A demand was made upon Mr. Bowman that he pay up the interest and taxes before the Union Trust Company started to foreclose our trust deed.

GREGORIO LOPERENA,

one of the objecting creditors, testified in substance as follows:—

Since May, 1935 Mr. Bowman has made no payment on account of principal or interest on the obligation owed to us by him. Mr. Bowman made all payments to the Bank. I don't remember when the last payment of interest was made but I think it was in April, 1934. Bowman never did offer me any money for either principal or interest on our obligation that I refused to take. Mr. Bowman never did make me a proposition privately but he made one at the Bank and he deposited some money in the Bank for back payments. I don't know how much he deposited in the bank but he drew it out.

PAUL WARD,

a witness called by the objecting creditors, testified in substance as follows:—

I am one of the Inheritance Tax Appraisers for the State of California. I made an appraisement of the Bowman property, lots 7 and 8, Block 2, Sherman's Addition, located at 16th and Market Streets, on December 11, 1936. The fair market value of that property at this time is \$9,000.00. The lots are 50 by 100 each, making 100 by 100 in all. One building on the property is two-story, with a drug store downstairs and apartments upstairs. The value of the building is \$3,000.00. It is an old building that has been remodelled and restuccoed on the outside. The building is approximately 50 feet wide, and 100 feet long. The building is very old; it has the appearance on the outside of being a fair building, but on examining the inside I found it in very poor condition. I thought that the building on the corner covered the entire property. There is a building to the west of the drug store building, and if that building is on this ground it would have to be included in appraising the property. The value of the lots is \$6,000.00 and the value of the building \$3,000.00. I was evidently mistaken, if there are two buildings on this property. The property isn't worth nearly as much today as it was in 1925. The store building should be rented for \$40.00 a month, and the apartments upstairs should lease for about \$35.00 a month; I would say that would be a fair rental income for the upstairs. The corner lot is worth \$4,000, and the inside 50 feet \$2,000. I saw a two-story frame building at the rear of the drug store building, and that is worth \$1500.00. I will change my appraisement to \$10,500.00, including the other building. My appraisement

considers that the building is free and clear. I didn't consider back taxes or anything of that sort. I have been an Inheritance Tax Appraiser for seven years, and have been in real estate work in San Diego since 1912, with the exception of three years spent in War service. I know of no sales of property in that immediate vicinity but my valuation is what a willing seller would sell the property for and what a willing buyer would pay for the property.

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MARTIN LOPERENA,

one of the objecting creditors, testified substantially as follows:—

I never did receive any offer of money from Mr. Bowman I refused to accept. I accepted the provisions contained in objecting creditors' exhibit A. We were ready to go ahead with the deal and make a contract to deed the property back to him after he had deeded it to us, but he withdrew the money.

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FRED NOON,

one of the attorneys for the objecting creditors, testified substantially as follows:—

I am one of the attorneys for the objecting creditors in this matter and am, to a considerable extent, familiar with all the proceedings that have been had in this matter. Mr. Bowman testified he had offered \$1000.00 and I had refused to accept it; that offer was never made. We discussed back and forth, attempting to come to some settlement. Mr. Bowman had made one proposition and then

another, and I didn't believe that he would keep his offers. Objecting creditors' exhibit A was made at Mr. Bowman's request. I submitted it to my clients, who were agreeable to accept it, and the next morning Mr. Bowman telephoned to me and said he had obtained legal advice; that he had been advised he would be foolish to make that deal and I understand that the money was withdrawn.

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C. F. McKAY,

a witness called by the Brunswig Drug Company, a secured creditor, testified substantially as follows:—

I am manager of the Brunswig Drug Company. The picture that I get from the figures presented is that the expenses of the business of the debtor run in excess of the sales. The average mark-up in the drug business over wholesale cost is 33-1/3%. Bowman cannot pay \$160.00 a month out of this business. The plan isn't workable, with the amount of expenditures being increased at the present time, without an increase in sales. The Brunswig Drug Company is against any further extension.

(NOTE:—The foregoing testimony by Mr. McKay was given on July 29, 1936. On December 11, 1936 the Brunswig Drug Company, and its attorney, Charles B. DeLong, consented in writing, to the supplemental proposal for extension filed on that day in this matter.)

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HAROLD R. CONKLIN,

a witness produced by the debtor, testified in substance as follows:—

I am the attorney for the Union Trust Company, of San Diego. The declaration of default on the Loperena trust deed note, and the notice thereon, was recorded January 15, 1935. At the time of the declaration of default the unpaid principal of the note was \$11,750.00. The interest due on the note on April 1, 1934 was not paid. This note is dated April 24, 1925 and the principal amount thereof is payable in installments of \$500.00 or more, the first day of every third month commencing July 1, 1925. The original amount of the note was \$25,000.00, with interest at 7% per annum, payable quarterly. Payments had been made to October, 1932, at which time the principal was \$11,750.00. Since that time there have been no payments made on the principal but there have been five payments made on interest ranging around \$205.00 to \$209.00 each, and one pencil notation of a payment of some kind 7/1/34—\$514.76.

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HOWARD RITTER,

a witness produced by the debtor, testified substantially as follows:—

I am the assistant cashier of the Security Trust & Savings Bank of San Diego, California. The records of the Bank show that payments were made to the Bank by L. W. Bowman on two different notes, one for \$25,-

000.00 and the other for \$3500.00. The records from which I am testifying include payments on both notes. On September 26, 1935, when the \$25,000.00 note was withdrawn from the Bank, the total indebtedness was \$11,750.00. The bank records show the following payments by L. W. Bowman:— Payment to the Bank July 5, 1932, interest to July 1, 1932, \$214.37; and \$250.00 on principal, total \$464.37, represented by check No. 1105 dated July 5, 1932. April 1, 1932, interest to April 1, 1932, \$218.75, and \$250.00 to apply on principal, total \$468.75, represented by check No. 999 signed by L. W. Bowman and payable to the Bank. January 6, 1932, interest to January 1, 1932, \$227.50, and \$500.00 to apply on principal, \$727.50, represented by check No. 888 signed by L. W. Bowman. October 6, 1931, interest to October 1, 1931, \$236.25, and \$500.00 on principal, total \$736.25, which amount, less \$8.75 a credit for overcharge of interest, is represented by check No. 758 for \$727.50, signed by Mr. Bowman. July 31, 1931, interest to July 1, \$218.76, and \$500.00 on principal, \$718.76, represented by check No. 626 of Mr. Bowman. April 1, 1931, interest at \$253.75 to April 1, 1931, and \$500.00 on principal, \$753.75, represented by check without number of that date. There is also a payment on April 2, 1930 of interest to April 1, 1930, \$288.75, and \$500.00 on principal; \$500.00 credited on the original note on April 2, 1930.

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FINDINGS OF THE REFEREE.

The debtor is not a wage-earner nor a farmer, but is now, and was at the time of the commencement of this proceeding, engaged in business as proprietor of a drug store at Sixteenth and Market Streets, in San Diego, California. The legal description of the property upon which said business is conducted is Lots 7 and 8, Block 2, of Sherman's Addition in said city. The drug store is conducted in a two-story building, the drug store occupying the downstairs portion with living quarters above. The debtor purchased this property in 1925 for \$30,000.00 from Martin Loperena, and others, who are the objecting creditors herein. Twenty-five thousand dollars of the purchase price of said property is represented by a trust note executed by the debtor, and secured by a trust deed upon said property. This trust note is payable in installments of \$500.00, or more, on the first day of every third month commencing July 1, 1925, with interest at 7% per annum, payable quarterly. The last payment made upon the principal sum of said promissory note was October 5, 1932, and the interest thereon has been paid up to January 1, 1934, with the exception of \$660.00 paid by the debtor pursuant to order of this Court of December 16, 1936.

The debtor is indebted, by reason of said Loperepa obligation, in the following amounts:—

Balance of principal amount unpaid,	\$11,750.00
Interest,	2,387.28
Taxes to December 31, 1936,	1,085.74
	<hr/>
	\$15,223.02

As to the contention by the debtor that he paid \$1,000.00 to Martin Loperena for which he did not receive credit, by reason whereof it is assumed he asks a reduction in the amount of his indebtedness to said Martin Loperena, and others, I find specifically that that contention cannot be sustained for the following reasons:— The payment of \$1,000.00 is stated by the debtor to have been made on March 24 or 25, 1925. On April 24, 1925 the debtor executed the trust note which is involved in this proceeding, for the sum of \$25,000.00. Subsequent to April 24, 1925 the debtor borrowed an additional \$3500.00 from said Martin Loperena, and executed his promissory note for that amount. There is no evidence in the record that the debtor made the claim when he executed either of said notes that he had not received credit for \$1,000.00 previously paid to said Loperena. Furthermore, the debtor's schedule filed in this matter list the indebtedness of the debtor to Martin Loperena, and others, at \$11,750.00, and the debtor has testified that that was the amount of his obligation to the Loperenas, with the accumulations thereupon herein found.

The real estate hereinbefore described, which is the security for the payment of the above indebtedness, and which was purchased by the debtor in 1925 for \$30,000.00, is at this time of the value of \$10,500.00.

In addition to the foregoing indebtedness the debtor is indebted to the Brunswig Drug Company in the amount of approximately \$5,000.00 on a conditional sale contract for the purchase of said drug store and equipment. The exact amount due said Drug Company is not apparent from the record.

The taxes on said real estate have not been paid for the years 1934-1935-1936, and said property has been

sold to the State of California for non-payment of said taxes.

The debtor also owns certain real property described as lot 1, and the north half of lot 2, Block 17, Culverwell's Addition, in San Diego, California. This property is leased as a service station for the sum of \$50.00 a month. The rental of said property is being received directly by the Security Trust & Savings Bank, of San Diego, and applied on an obligation of the debtor in the original amount of \$1400.00. After this indebtedness to the Bank has been paid the receipts from said property are to be paid to Charles L. Sloane, directly, and applied upon an obligation of the debtor to him in the original amount of \$1700.00.

The debtor and his wife are separated, and a divorce action between them has been pending in the Superior Court of the State of California, in and for the County of San Diego. The debtor has, since July, 1935, been paying to his wife, Dorothy Bowman, the sum of \$50.00 per month for her support and maintenance, pursuant to an order of said Superior Court.

While it is not in the record the statement was made by counsel at one of the hearings had in this matter that said divorce action has been determined by said Superior Court, and the said Court had rendered its decision awarding lot 1, and the north half of lot 2, Block 17, Culverwell's Addition, last hereinabove referred to, to the wife of the debtor and the drug store property at Sixteenth and Market Streets to the debtor; also that in said decision said Court directed that the debtor pay to his wife the sum of \$75.00 per month for her support and maintenance.

The debtor has filed proposed plans for extension on July 6, 1935; August 21, 1936; December 11, 1936 and June 11, 1937. The last two proposals are similar with the exception of the plan for payment of the taxes. These plans comprehend the following payments, referring particularly to the last two proposals:—

Martin Loperena, and others, objecting creditors,

monthly,	\$110.00
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Brunswig Drug Company, monthly,	50.00
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Estate of Esmie Malone, monthly,	10.00
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These payments are to be applied first on unpaid interest and the balance, if any, upon the unpaid principal of the different obligations. The last proposed plan does have a second alternative proposal wherein the arrangement for payment of taxes is altered and the sum of \$1,000.00 is proposed to be paid upon the principal of an undesignated obligation, presumably the Loperena obligation, either by cash or credit, on or before January 1, 1938.

The debtor has an income as follows:—

Net receipts from business (based upon figures for period January-November, 1936, inclusive),	\$154.61
Claimed rental value of living quarters at 16th and Market Sts., per annum,	900.00
	<hr/>
	\$1054.61

The debtor proposes to pay the following sums:—

Loperena obligation, per annum,	\$1320.00
Current taxes on Loperena property,	222.76
One-tenth of delinquent taxes, per annum,	78.09
	<hr/>
	\$1620.85

It is unfortunate that the foregoing computation has to be based upon the income of the debtor for the period January to November, 1936, but no other information has been furnished. An order was made by the Court on May 20, 1937 that the debtor submit to the Court a statement of his receipts and disbursements since January 1, 1937, together with a statement of his then liabilities. The debtor failed in whole, and without any explanation on his part, to comply with that order.

True, the debtor does contend that during the period for which figures are submitted he has been called upon to expend moneys for extraordinary purposes. For instance, he testifies that he expended \$526.76 for the hospitalization of his wife, Dorothy Bowman; also that an anticipated upturn in the debtor's business would result in an increased income. Whether the latter goal has been reached is not in evidence.

In the alternative proposal contained in the proposed plan submitted on June 11, 1937, the debtor proposes to pay in full all city, county and state taxes prior to January 1, 1938 on the Market Street property, and in addition to pay \$1,000.00 upon the unpaid principal of, I presume, the Loperena obligation. How the debtor would, during a period of approximately six and one-half months, pay some \$2087.74, in addition to the taxes for the year 1937 which would be payable during that period, is not apparent. No evidence was offered by the debtor to substantiate either of the proposed plans submitted by him on June 11, 1937. It may be assumed, I take it, that if evidence were offered it would not be different than that already received.

A granting of the debtor's request for an extension, based upon any of the proposed plans submitted by him would necessitate mere conjecture on the part of the Court as to whether the plan was workable. To say that the debtor could borrow these different sums would in no sense tend toward his financial rehabilitation—to borrow from Peter to pay Paul is an economic ambiguity.

Any plan proposed by the debtor must include an equitable and feasible method of liquidation for secured creditors whose claims are affected, and of financial rehabilitation for the debtor.

I find that none of the proposed plans of the debtor are feasible, for the reason that the debtor's income is not sufficient to make the payments, or payment, proposed therein.

None of said plans are equitable because they contemplate an extension of time of payment of the Loperena obligation over a period of years during which no provision is made for deterioration of the improvements upon the property, and it is apparent now that the security for this obligation, the Market Street property, is gradually lessening in value.

Neither do any of said proposed plans provide the means of financial rehabilitation for the debtor. From the facts in evidence it is impossible to determine how the debtor could himself exist upon his income, even assuming he did make the payments proposed to be made in any plan submitted by him. The possibility of the debtor eventually emerging from the chaotic condition in

which his finances now are, through any of the plans submitted by him, seems entirely remote. It is apparent that if the payments proposed to be made by the debtor in his different proposed plans should occur that the debtor would have to resort to some other means therefor than his income.

The debtor did comply for a period of six months with the order of the Referee of December 16, 1936, that he should pay to the Loperenas the sum of \$110.00 per month—whether he also during that period complied with the order of the Referee that he pay the Brunswig Drug Company \$50.00 per month and to the heirs of Esmie Malone, deceased, the sum of \$10.00 per month, is not in the record. The debtor did not comply with that order to the extent of paying any amount on account of delinquent taxes nor of the current taxes on the property at Sixteenth and Market Streets which is covered by the Loperena trust deed.

In *In Re Llewellyn; Jahn v. Llewellyn*, 86 Fed. (2d) 588, C. C. A., 7th Circuit (Illinois), decided on November 19, 1936, it is said:—

"Any plan of re-organization must be fair to both parties. The mortgagee is entitled to equal consideration with the mortgagor. While the collection efforts of the mortgagee may well be stayed for a reasonable time, provided there exists reasonable likelihood of her mortgage being paid at that time, it is manifestly unfair to postpone interest payment, repayment of moneys advanced to pay taxes for a period of five years, and leave the

mortgagee's recovery of principal and interest to chance or speculative uncertainties, based wholly on 'hopes' born of wistful wishing, strong desires or urgent necessities. In the absence of facts to support hopes there exists no sufficient support for a plan which postpones mortgagee's rights and remedies arising out of a past-due secured indebtedness."

I therefore find that the plans submitted and proposed by the debtor are not such plans, nor is any one of them such a plan, as is contemplated by Section 74, Subdivision g, of the Bankruptcy Act, and that the confirmation of the debtor's proposal for an extension should be denied.

I have received no compensation of any sort in this matter except the sum of \$5.00 demanded of, and paid to me by, the debtor for the preparation of this record.

Respectfully submitted,

Stanley T. Howe
Referee in Bankruptcy.

[Endorsed]: Filed Jul. 15, 1937 at 9 o'clock A. M.
Stanley T. Howe, Referee. Filed R. S. Zimmerman, Clerk
at 42 min. past 11 o'clock, Aug. 17, 1937 A. M. By F.
Betz Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER CONFIRMING REFEREE'S FINDINGS ON
REVIEW.

The petition of the debtor to review the order of Stanley T. Howe, one of the Referees of this Court, dated June 14, 1937, denying the petition of the Debtor for confirmation of his proposal for an extension in this matter, having come on regularly for hearing on the 15th day of October, 1937, the Debtor, Lamont William Bowman being present in person and represented by his attorneys, J. Earl Haskins and William K. Brown; and Gregorio Loperena, Martin Loperena, Martin J. Loperena and Phyllis Bouton, creditors objecting to the confirmation of said proposal for extension also being present in person and represented by their attorneys, Noon & Noon, and the findings of the Referee, the record on review, and the discussion of counsel being all considered by the Court; and

It appearing to the Court, and the Court now finds, that the findings of said Referee are correct and that his order of June 14, 1937, denying the petition of the Debtor for an extension and for confirmation of his proposal therefor, should be confirmed, it is therefore

ORDERED that said order of the Referee be, and the same is hereby confirmed, and

IT IS FURTHER ORDERED that the stay of proceedings under the Order of Adjudication and Reference heretofore entered in this matter on August 21, 1936, be

and the same is hereby vacated, set aside and quashed, and the Referee is directed to proceed under said Order of Reference and Adjudication to take and perform any and all such acts, and to do such things, as are required, directed and authorized under said Order of Adjudication and Reference.

Done in Open Court this 25 day of October, 1937.

Jeremiah Neterer

JUDGE OF THE U. S. DISTRICT COURT

Service of copy of the within is acknowledged this 23
day of October, 1937.

J. Earl Haskins & W. K. Brown
by W. K. Brown

Attorneys for Lamont William Bowman.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 47
min. past 11 o'clock Oct 25, 1937 A. M. By M. R.
Winchell, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PETITION OF PETITIONING DEBTOR FOR
REHEARING

TO THE HONORABLE JUDGE
OF THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN DIVISION:

The petition of Lamont William Bowman, petitioning debtor in the above entitled cause, respectfully shows:

1. That on the 23rd day of May, 1935, this petitioning debtor filed a petition under Section 74 of the Bankruptcy Act, praying among other things that an order be made by this Honorable Court granting unto this debtor additional time in which to pay his obligations, and also praying that this Honorable Court approve of certain extension proposals subsequently presented by this debtor, which proposals were for the best interest of both the creditors and the said debtor; but in all of said proposed extension proposals the debtor herein specifically waived any and all composition of said obligations and did only request that an extension of time be granted in which to liquidate and pay his obligations.

2. That prior to the time of the submitting of said extension proposals all of the creditors of this petitioning debtor, both secured and unsecured, agreed to the extension proposal, with the exception of that certain creditor designated as Martin Loperina, et al, which creditor owned and held a note in a sum alleged to be approximately Eleven thousand seven hundred fifty (\$11,750.00) dollars, which note was secured by a first deed of trust

upon the buildings and real property wherein this *petition* debtor conducted his drug and pharmacy business and which obligation was more than fifty per cent in amount of all of the obligations then and there owing by this said petitioning debtor the creditors, Martin Loperina, et al, objected to the granting of said extension proposals and/or subsequent proposals thereafter submitted on the ground that they owned more than fifty per cent of the amount of the total obligations of said debtor and further on the ground that any extension proposals were not for their, and only their, best interests.

3. That subsequently, after an order had been made by the Honorable Referee in Bankruptcy sitting in said Southern Division at San Diego, California and on or about the 15th day of May, 1936, a petition for review of said order of the referee was heard and determined and said entire matter was then and there remanded back to the Honorable Referee to hear and consider the extension proposal heretofore filed.

4. That subsequent to said time an additional extension proposal was filed and heard by the Honorable Referee and thereafter denied and on or about the 16th day of October, 1936, a petition for review of the last order of the referee denying the extension proposal of said debtor was heard and determined and was on said date reversed and the entire matter was again remanded to the Honorable Referee of said Southern Division at San Diego to hear and consider "said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt * * * and it is further ordered that all proceedings herein, . . . , be stayed until further order of this Court made by a Judge thereof." Said

order of said District Judge did not specifically set aside the order wherein Lamont William Bowman was adjudicated a bankrupt, but specifically stayed any proceeding relative thereto until further order of this Court.

5. That thereafter an additional extension proposal was heard and considered by the Honorable Referee on or about the month of November, 1936, and the Honorable Referee did then and there make his interlocutory order granting said petition and the terms and conditions thereof and did specifically set same for further consideration and hearing on or about the month of March, 1937; that thereafter extensions of time were granted on account of the final hearing of said petition and the same was not fully and finally determined until on or about June 14, 1937, at which time the Honorable Referee denied said extension proposal on the ground that it was not for the best interest of the secured creditor and the interest of the debtor's estate.

6. That thereafter a Writ of Review was filed on the order of the Referee last named and said Writ of Review came on regularly for hearing on the 15th day of October, 1937; that at said time the Honorable Jeremiah Neterer was then and there sitting as District Judge of the Southern District of California, Southern Division thereof at San Diego, California, and did then and there hear the petition for review from the order and recommendation of the referee heretofore made on June 14, 1937. That the order confirming said Referee's Findings on Review was not actually signed by the Judge until on or about the 25th day of October, 1937.

7. That at the time of the hearing on review above mentioned on or about the 15th day of October, 1937,

there were filed and presented to the Honorable Court (a) Petition of Debtor for Review of Recommendation and/or Order of Referee, (b) Affidavit of C. F. McKay setting forth additional facts and evidence not set forth or included in the Certificate of Referee, and (c) Affidavit of Lamont William Bowman setting forth facts not included in the Certificate of the Referee and exhibits and documents attached thereto which were specifically made a part of said affidavit as if fully set forth therein.

That said Affidavit of Lamont William Bowman specifically set forth that an action had been filed July 26, 1937 and subsequent to the date of said referee's order, to-wit, June 14, 1937, in the District Court of the United States, Southern District of California, Southern Division, entitled Lamont William Bowman, petitioning debtor in action No. 1048 in the District Court of the United States, Southern District of California, Southern Division, Plaintiff, vs. Martin Loperina, Gr. goria Loperina, Martin J. Loperina, Phyllis Bouton, Union Trust Company of San Diego, a corporation, Defendants, No. B-17-E, wherein your affiant demanded an accounting and declaratory relief on account of One thousand (\$1,000.00) dollars heretofore paid to Martin Loperina, which had not been credited on said indebtedness and to said affidavit there was attached a full, true and correct copy of the complaint in said action.

8. At the time of the presentation of said documents heretofore designated under the letters (b) and (c) the Honorable Court specifically refused to read or consider

any or either of the documents then and there filed and specifically stated from the bench that the Court was considering only the Certificate of Referee on Petition for Review and the Honorable Court further did state that the Referee's order and recommendation heretofore filed was being affirmed by this Court, "because there has to be an end to litigation sometime and this case has dragged on long enough."

SPECIFICATIONS OF ERRORS

I

That there was a manifest misapprehension by the Honorable Court as to the law applicable to the facts in said proceedings and/or proceedings and the whole thereof insofar as the Honorable Court refused and failed to consider the documents enumerated in paragraph 6 hereof:

"The Court may reverse findings when certain testimony in the case appears to have been overlooked or ignored."

In re Grant Bros (D. C. N. Y.) 118 Fed. 73.

II

That the Court erred in not considering specifically the affidavit of C. F. McKay which affidavit particularly contradicted the statements alleged to have been testified to by him before the referee, as reflected by the Referee's Certificate.

III

That the Honorable Court erred in applying the law to the material facts in said proceeding.

IV

That the Honorable Court erred as a matter of law by his refusal to consider the whole and entire record in

said case and also by his refusal to hear or consider the matters set forth in the petition.

V

That the only evidence (Certificate of Referee on Petition for review) which was considered by the Honorable Court was wholly insufficient to support the decree affirming the Referee's order.

"Where, upon a petition for review of an order of a referee, his report does not state the facts with sufficient definiteness to enable the court to pass upon the questions whicir may arise, the whole case should be sent back to the referee, with instructions to grant a rehearing."

Matter of Hawley, etc., Furnace Co. (D. C. Pa.)
214 Fed. 500.

"The District Court may review the whole case and is not restricted to the finding of the referee either as to fact or law."

Matter of Handy-Andy Stores (D. C. La.) 51
F. (2) 98.

VI

That the Certificate of Review on Petition for Review as prepared by the said referee is wholly insufficient to support the order of the Court.

VII.

That evidence has been newly discovered. Said newly discovered evidence was set forth in the Affidavit of Lamont William Bowman, lines 18 to 30 inclusive on page 2 thereof, which newly discovered evidence consists of the following, to-wit:

"Your affiant further states that an action has been filed in the District Court of the United States, in and for the Southern District of California, Southern Division, entitled Lamont William Bowman, petitioning debtor in action No. 1048 in the District Court of the United States, Southern District of California, Southern Division, Plaintiff, vs. Martin Loperina, Gregoria Loperina, Martin J. Loperina, Phyllis Bouton, Union Trust Company of San Diego, a corporation, Defendants, No. B-17-E, wherein this affiant demands an accounting and declaratory relief on account of the One Thousand Dollars (\$1,000.00) heretofore paid to Martin Loperina which has not been credited on said indebtedness, a full, true and correct copy of the complaint being hereunto attached and made a part of this affidavit."

The above referred to complaint was filed on or about the 26th day of July, 1937. The Referee made his "order denying Petition for Extension and of Confirmation of Proposal therefor" on or about the 14th day of June, 1937. Obviously then, this is newly discovered evidence as it was not considered by the Referee inasmuch as it was never before him and also it was not considered by the Court as the Court did not read or consider the affidavit of Lamont William Bowman.

Such newly discovered evidence has a material bearing upon the issues herein involved because:

- (a) The objecting creditors, Loperina, were on or about the month of January, 1935, and still are indebted to this petitioning debtor in the amount of One thousand dollars (\$1,000.00) with interest thereon, this being so it follows directly that the statements made by the creditors, Loperina, that this petitioning debtor was in default to

them on the first trust deed were and still are false and should not have been considered by this Honorable Court.

(b) This petitioning debtor not having been in default to the objecting creditors, Loperina, it follows that they should now be estopped from occupying the position of objecting creditors.

(c) That the adjudication of bankruptcy should be set aside and the matter be remanded to the Referee with orders to (1) reconsider the petitioning debtor's Proposal for Extension and (2) to withhold any proceedings in the bankruptcy matter until such time as it can be ascertained whether or not said trust deed was actually in default at the date that the declaration of default was made on or about the month of January, 1935.

VIII

The Court erred as a matter of law, in not considering the newly discovered evidence specifically set forth in the Petition of Lamont William Bowman.

WHEREFORE, this petitioning debtor prays that a rehearing may be had in said cause upon a date certain to be fixed by the Court and that said Referee in Bankruptcy, Stanley T. Howe, be restrained and enjoined from proceeding further in said case until further order of this Court and that this petitioning debtor may have and recover any and all rights which he has lost by reason of the aforesaid orders of the Referee and the said District Judge.

Dated: This 15th day of November, 1937.

LAMONT WILLIAM BOWMAN, Debtor

By J. Earl Haskins

One of the Attorneys for Petitioner.

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA)
SOUTHERN DIVISION,) ss.
COUNTY OF LOS ANGELES)

J. EARL HASKINS, being first duly sworn, deposes
and says:

That he is one of the attorneys for the petitioner in the foregoing petition; that he has read the said petition and believes the same to be true; that said petitioner is absent from and is a non-resident of the County of Los Angeles, State of California, wherein your affiant maintains his office; and that your affiant makes this affidavit for the reason that the petitioner is absent from and is a non-resident of the said County of Los Angeles.

J. Earl Haskins

Subscribed and Sworn to before me this 15th day of November, 1937.

[Seal]

Henry E. Phister

Notary Public in and for the County of
Los Angeles, State of California.

J. EARL HASKINS, CHARLES PECKHAM
and W. K. BROWN

By J. Earl Haskins

Attorneys for Petitioner

This petition having been "seasonably presented" and "entertained" by the above entitled court, permission to file same is hereby granted.

DATED: This 15th day of November, 1937.

Ralph E. Jenney
Judge of the District Court.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27
min. past 4 o'clock Nov. 15, 1937 P. M. By M. R. Win-
chell, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT OF J. EARL HASKINS

J. EARL HASKINS, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioning debtor herein. This affiant further avers that on or about the 26th day of July, 1937, he prepared and filed a complaint for an accounting and declaratory relief wherein this petitioning debtor was the plaintiff and Martin Loperina, et al, were defendants, said action being numbered B-17-E in the above entitled Court.

Affiant further avers that at the time of the hearing of the last Writ of Review, to-wit, on or about October 15, 1937, that there was handed to the Honorable Jeremiah Neterer, District Judge of the above entitled Court in the Courtroom of the said District Court of San Diego, California certain affidavits material to the issues involved in this action. That the affidavit of C. F. McKay, manager of the San Diego Branch of the Brunswick Drug Company, a corporation, sets forth specifically that the statements made by the Honorable Referee, Stanley T. Howe, in his Certificate of Review were not fully set forth and were further incorrect in material details and that the Affidavit of C. F. McKay was filed specifically to correct the error set forth in the Referee's Certificate.

Your affiant further states that the facts set forth in said affidavit were very material to the issues in the case and that if the Honorable Judge Neterer would have con-

sidered said affidavit, that there were sufficient grounds set forth therein for the said Honorable Judge to have granted said Writ of Review and to have remanded the matter back to the Honorable Referee for further consideration.

Affiant further states that at said time there was also presented to the Honorable Judge Neterer the affidavit of Lamont William Bowman, petitioning debtor herein, which affidavit set forth specifically that new and additional evidence had been discovered and that subsequent to the date of the order of the referee denying debtor's extension proposal, to-wit, on June 14, 1937, that the aforementioned action number B-17-E had been filed on the 26th day of July, 1937. Said affidavit of Lamont William Bowman further set forth that the Honorable Referee had misquoted and misstated certain testimony relative to the value of the real property involved in this action and that said Lamont William Bowman further set forth that the value of said real property was in excess of twenty thousand (\$20,000.00) dollars and at all times a great deal more than sufficient to pay in full all of the outstanding indebtedness and interest then and there due, owing and unpaid to the objecting creditors; Martin Loperina, et al.

Affiant further states that the Honorable Jeremiah Neterer then and there presiding specifically refused to read or consider any or all of the documents in said file in said matter, except the certificate of the referee heretofore filed and did further refuse to read or consider "Petition of Debtor for Review of Recommendation and/or

Order of Referee" and both of the Affidavits of C. F. McKay and Lamont William Bowman hereinbefore referred to.

That the Honorable Court further stated from the bench that the Referee's order was being affirmed "because there has to be an end to litigation sometime and this case has dragged on long enough."

Affiant further states that the Honorable District Judge erred as a matter of law by his refusal to consider the whole and entire record in said case and also by his refusal to hear or consider the matters set forth in the Affidavit of Lamont William Bowman relative to the matter of newly discovered evidence which entitled said Lamont William Bowman to additional credits as specifically set forth and prayed for in that action B-17-E filed on July 26, 1937, and whether or not the said trust deed was actually in default on the date that the declaration of default was made.

WHEREFORE, your affiant prays that the within affiant may be used in support of the petition for rehearing in the above entitled matter.

J. Earl Haskins

Subscribed and Sworn to before me this 15th day of November, 1937.

[Seal]

Henry E. Phister

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 28 min.
past 4 o'clock Nov. 15, 1937 P. M. By M. R. Winchell,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT OF C. F. MCKAY SETTING FORTH
ADDITIONAL FACTS AND EVIDENCE NOT
INCLUDED IN THE CERTIFICATE OF THE
REFEREE

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

C. F. McKay, being duly sworn, deposes and says:

That he is now and ever since on or about March of 1936, has been the general manager of the Brunswick Drug Company of San Diego, California. That your affiant has read the statement of the evidence as set forth in the certificate of the Honorable Stanley T. Howe, Referee in Bankruptcy, of the above entitled court, and that said statement does not include evidence concerning the relationship of the Brunswick Drug Company with the petitioning debtor, Lamont William Bowman, and has not stated correctly. Affiant states that said Lamont William Bowman has been managing, running and operating the said drug store at the location of 16th and Market Streets ever since on or about the year 1923 and ever since said time that the records of the Brunswick Drug Company show that said Lamont William Bowman has conducted and operated a very successful and profitable business.

Affiant further states that on or about the year 1934 said Lamont William Bowman met with a serious automobile accident, which caused serious results and that debtor met with financial reversals in other lines of business which made it necessary for the Brunswick Drug Company to secure an indebtedness to them in the sum

of approximately Fifty-five hundred (\$5500.00) dollars by having said Lamont William Bowman execute to them an encumbrance against the said business, store and fixtures of said Lamont William Bowman in a like sum. Your affiant is informed and believes and upon that ground alleges that said Lamont William Bowman maintains a stock of merchandise in his store fully paid for of a value of approximately Sixty-five hundred (\$6500.00) dollars and that the fixtures and other equipment in said store have a value in excess of Two thousand (\$2000.00) dollars; that the reasonable value of the said business, stock and fixtures of the drug store owned, operated and maintained by the said Lamont William Bowman is in a sum in excess of Eight Thousand Five Hundred Dollars. Affiant further states that the business maintained and conducted by said Lamont William Bowman should net approximately Six hundred (\$600.00) dollars per month on the basis of Two thousand (\$2000.00) dollars gross sales and your affiant is of the opinion that the sales of said business will increase materially as business conditions generally increase to the extent that the gross volume of sales should be at a minimum of from three thousand to thirty-five hundred dollars. That the net profits derived from said business should be approximately thirty per cent of gross sales.

Your affiant further states that the Brunswig Drug Company has at all times cooperated with said Lamont William Bowman in the maintaining and conducting of his said business and that the said Brunswig Drug Company has at all times consented to the extension proposals submitted by said Lamont William Bowman.

Affiant further states that during the past two years Lamont William Bowman has reduced the indebtedness

to said Brunswig Drug Company in a substantial amount and has at all times increased the general value of his stock of merchandise on hand at least by the sum of Twelve Hundred (\$1200.00) dollars. Affiant further states that the Brunswig Drug Company will cooperate with the said petitioning debtor on any feasible plan to rehabilitate the said debtor and permit him to operate and maintain his said business.

Affiant further states that said Brunswig Drug Company is not against granting petitioning debtor further extensions in which to work out his financial difficulties.

Affiant further states that he is of the opinion that the Brunswig Drug Company will assist the said Lamont William Bowman financially when and as the said Brunswig Drug Company can be properly protected from financial loss by reason of the present existing proceedings.

Affiant further states that the reasonable rental value of the store building now occupied by said Lamont William Bowman in said building is the sum of Eighty-five (\$85.00) dollars per month. Affiant further has appraised the real property and improvements wherein debtor maintains his drug store and believes the same are reasonably worth Twenty Thousand (\$20,000) Dollars.

Chas. F. McKay

Subscribed and sworn to before me this 15 day of October, 1937.

[Seal]

J. Earl Haskins

Notary Public in and for said County & State.

[Endorsed]: Received copy of the within this 15th day of Oct. 1937 Noon & Noon, attorneys for objectors.
Filed Oct. 15, 1937, 3 P. M. R. S. Zimmerman, Clerk
By Theodore Hocke, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT OF LAMONT WILLIAM BOWMAN

STATE OF CALIFORNIA)

: ss

COUNTY OF SAN DIEGO)

LAMONT WILLIAM BOWMAN, being duly sworn, deposes and says:

That he is familiar with real estate values in the vicinity of 16th & Market Streets, San Diego, California, the location wherein the property in controversy is located.

Affiant further states that the said property has been recently appraised by the First National Trust & Savings Bank of San Diego in the sum of Twenty Thousand Dollars (\$20,000.00) and that your affiant has been advised that the said Security Trust & Savings Bank of California will make a first mortgage loan on said property in the sum of Eighty-five hundred Dollars (\$8,500.00).

Affiant further states that the real property and improvements thereon are reasonably worth at this time in excess of Twenty Thousand Dollars (\$20,000.00); that the business, merchandise and fixtures of the said drug store are reasonably worth in excess of Nine Thousand Dollars (\$9,000.00); that your affiant owns other property in San Diego of a reasonable value of Seventy Five Hundred Dollars (\$7,500.00); that said last mentioned parcel of property is well-leased and nets a good and substantial income; that the encumbrance thereon is less

than Twenty Five Hundred Dollars (\$2,500.00) and that all of the taxes and assessments have been paid in full; that said real property has a cash equity of an amount not less than Forty Five Hundred Dollars (\$4,500.00) which sum would be available to this affiant for payment to any amount determined to be due to the objecting creditor, Loperina. Affiant further states that his assets are far in excess of his liabilities and that if given time in which to pay his said obligations, that each and all of his creditors can be paid in full.

Affiant further states that when and as the Honorable Referee of the above entitled Court made his order permitting your affiant to pay to the Loperenas the sum of One Hundred Ten Dollars (\$110.00) per month that your affiant paid all of said sums promptly and paid such other sums as were set forth in his said agreement to be paid with the exception of the taxes on said property and that your affiant did not pay said taxes for the reason that the objecting creditors Loperenas had not consented in any manner whatsoever to withdraw their objections prior to the time that said taxes should have been paid.

Affiant incorporates in this, his affidavit, as fully as if set forth herein at length his petition for review heretofore filed on July 15, 1937, in the above entitled action.

Your affiant further states that an action has been filed in the District Court of the United States in and for the Southern District of California, Southern Division, entitled Lamont William Bowman, petitioning debtor in action No. 1048 in the District Court of the United States,

Southern District of California, Southern Division, Plaintiff, vs. Martin Loperina, Gregoria Loperina, Martin J. Loperina, Phyllis Bouton, Union Trust Company of San Diego, a corporation, Defendants, No. B-17-E, wherein this affiant demands an accounting and declaratory relief on account of the One Thousand Dollars (\$1,000.00) heretofore paid to Martin Loperina which has not been credited on said indebtedness, a full, true and correct copy of the complaint being hereunto attached and made a part of this affidavit.

WHEREFORE, affiant prays that his petition for extension of time be granted and that he be permitted to continue making the payments in accordance with the terms of his said last proposals.

Lamont William Bowman

Subscribed and sworn to before me this 15th day of October, 1937.

[Seal]

W. K. Brown

Notary Public in and for said County and State.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

* * *

LAMONT WILLIAM BOWMAN, petitioning debtor in action No. 1048 in the District Court of the United States, Southern District of California, Southern Division,) No. B-17-E
Plaintiff,) COMPLAINT TO
vs.) ESTABLISH
MARTIN LOPERINA, GRE-) TRUST, FOR AC-
GORIA LOPERINA, MAR-) COUNTING AND
TIN J. LOPERINA, PHYL-) FOR DECLARA-
LIS BOUTON, UNION) TORY RELIEF
TRUST COMPANY OF SAN)
DIEGO, a corporation,)
Defendants.)

Comes now the plaintiff and for cause of action against the defendants alleges:

I

That on or about the 23rd day of May, 1935, Lamont William Bowman, as petitioning debtor, filed in the above entitled Court, a debtor's petition under Section 74 of the Bankruptcy Act. That simultaneously with the filing of

said action an order was made by Honorable William P. James, Judge of the above entitled Court, restraining and enjoining Martin Loperina, Gregoria Loperina, husband and wife; Martin Loperina and Feliciana Bouton, heirs of Juan Loperina, deceased; Sebastiana Loperina and Gregorio Loperina, husband and wife; and the Union Trust Company of San Diego, a corporation, from conducting or holding any trustee's sale under and by virtue of a power granted to said trustee under the terms of a deed of trust under date of April 24, 1925, said deed of trust having been regularly recorded in Book 1063 of Deeds at page 367 in the office of the County Recorder of San Diego County, California, wherein Lamont William Bowman and Dorothy Bowman were trustors and the Union Trust Company of San Diego, a corporation, was trustee and Martin Loperina, et al., were beneficiaries; that said order of the Court has never been revoked or modified and is now in full force and effect; said deed of trust above referred to covers the following described property:

Lots 7 and 8 in Block 2 of Sherman's Addition, according to map thereof No. 856, filed in the office of the County Recorder of said San Diego County, February 18, 1899.

II

Plaintiff alleges that on or about the 25th day of March, 1925, he paid to Martin Loperina, in lawful money of the United States, the sum of One thousand (\$1,000.00) dollars, which the said Martin Loperina did then and there agree to apply upon and credit to any balance due, owing and unpaid, to said beneficiaries above named on account of the said note and deed of trust hereinbefore referred to.

III

Plaintiff further alleges that he did not know, nor did he have any reason to believe; that said beneficiaries heretofore named in said deed of trust did not intend to or would not credit said sum above referred to until on or about January 15, 1935.

IV

That demand has been made upon the defendants herein named to credit said sum of One thousand (\$1,000.00) dollars together with any and all interest accruing on said sum compounded annually at the rate of seven per cent per annum from and after March 25, 1925, upon any indebtedness secured by the said deed of trust hereinbefore referred to, but that the defendants and each of them have failed and refused and still fail and refuse to credit said sum or any part thereof on any indebtedness due, owing and unpaid to the beneficiaries under said deed of trust.

V

Plaintiff further alleges that Martin Loperina, Gregoria Loperina, Martin J. Loperina and Phyllis Bouton hold in trust for the benefit of the plaintiff herein the said sum of One thousand (\$1,000.00) dollars together with interest thereon compounded annually at seven per cent per annum from and after March 25, 1925.

VI

Plaintiff further alleges that if the beneficiaries under said deed of trust hereinbefore named had properly credited the said sum of One thousand (\$1,000.00) dollars together with all interest then and there due, owing and unpaid to this plaintiff, on account of the said indebtedness secured by said deed of trust as of January 15, 1935, that

the said deed of trust would not have been in default and would have been in good standing in all respects.

VII

Plaintiff alleges that an actual controversy has arisen between himself and the defendants herein named relative to the actual sums remaining due, owing and unpaid under and by virtue of the note secured by the said deed of trust hereinbefore referred to and plaintiff asks that a declaration of his rights and duties with respect to the beneficiaries herein named be declared by this Court together with a declaration of the legal rights and duties of the respective parties named in this action, and to further determine whether or not this plaintiff is entitled to relief as hereinbefore set forth and to determine whether or not the said deed of trust hereinbefore referred to was in default as of the date of the filing of the declaration of default thereon.

VIII

Plaintiff further alleges that subsequent to the filing of this complaint that there was offered and tendered to the beneficiaries named in said deed of trust all and sufficient sums to pay any unpaid balance due under said note secured by said deed of trust as aforesaid provided that the beneficiaries in said deed of trust would have properly given credit to this plaintiff for said sums hereinbefore set forth; that the said Lamont William Bowman, plaintiff herein, was on August 21, 1936, erroneously, as a matter of law, adjudicated a bankrupt upon an erroneous recommendation of the Honorable Referee in Bankruptcy of the above entitled Court and that subsequent thereto there was an order made by the Honorable Paul J. McCormick, District Judge, at San Diego, California, on the 16th day

of October, 1936, staying any and all proceedings under the adjudication and order of reference until further order of this Court made by a Judge thereof; that no further orders have been made by any Judge subsequent to the time of the order above referred to.

WHEREFORE, plaintiff prays judgment against the defendants and each of them as follows:

1. That it be declared, adjudged and decreed that the defendants herein named, except the Union Trust Company of San Diego, a corporation, hold in trust for the use and benefit of plaintiff herein the sum of One thousand (\$1,000.00) dollars together with interest thereon compounded annually at the rate of seven per cent per annum from and after March 25, 1925.
2. That it further be adjudged and decreed that any and all amounts determined to be held in trust by the beneficiaries hereinbefore named be applied toward the payment of any obligation due, owing, or unpaid under said deed of trust as of January 15, 1935.
3. That it further be adjudged and decreed that said deed of trust was not in default as of the date of January 15, 1935.
4. That this Honorable Court make its declaration as to the legal rights and duties of the respective parties herein.
5. For such other and further relief as may be proper together with costs of suit herein incurred.

J. Earl Haskins
Attorney for Plaintiff.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

J. Earl Haskins being by me first duly sworn, deposes and says: that he is the attorney for plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That he makes this verification for and on behalf of the plaintiff for the reason that plaintiff is not within the County in which said attorney maintains his offices.

J. Earl Haskins

Subscribed and sworn to before me this 26th day of July, 1937.

[Seal]

Henry E. Phister

Notary Public in and for the County of
Los Angeles, State of California.

[Endorsed]: Received copy of the within this 15th day of Oct. 1937 Noon & Noon, Attorneys for objectors. Filed Oct. 15, 1937 3 P. M. R. S. Zimmerman Clerk By Theodore Hocke, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION.

In the matter of) NO. 1048
LAMONT WILLIAM BOWMAN,) DECISION
Debtor.) and
) ORINION.
) Filed this 17
) day of Feb 1938

J. Earl Haskins & Charles Peckham, Attorneys for the
Debtor.

Noon & Noon, attorneys for Martin Loperena, Gregorio
Loperena, Martin J. Loperena & Phyllis Bouton, Ob-
jecting Creditors.

NETERER, District Judge.

This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate.

Foreclosure proceedings on a trust deed had been commenced and sale of the property fixed on May 24, 1935. On May 23rd, 1935, the debtor filed with the approval of the court, a petition wherein he states "that he is unable to meet his debts as they mature, and that he desired to affect an agreement to tender a plan for extension of time to pay his debts, under Sec. 74 of the Bankruptcy Act." The matter was referred to the Referee at San Diego, and the sale restrained, which order is now in force. The debtor's schedule was filed on June 4th, 1935; July 6th,

1935, he submitted his proposed plan as a basis for an extension of time. Secured creditors, in writing, filed objections thereto. After hearing before the then Referee, an order was entered July 26, 1935, denying the application for the extension, on the ground that the requisite number of creditors did not consent to such extension, and recommended that the debtor be adjudicated bankrupt. On review this order was reversed and the matter referred for further proceedings. Many hearings were had before the Referee. A supplementary proposal was filed by the debtor on Aug. 8, 1936; on Aug. 19, 1936, the Referee certified to the court that the proposal did not provide an equitable and feasible method for secured creditors, and it is not for the best interests of all the creditors, and recommended the debtor be adjudicated bankrupt, and adjudication accordingly followed. A petition to review was filed Oct. 16, 1936, and the matter was referred to the Referee for further proceedings. Thereafter, a hearing was had at which all interested parties appeared in person and by attorney.

The third supplemental proposed plan was filed Dec. 11, 1936. On Dec. 16th, 1936, the Referee by order, required the debtor to pay to the secured creditors, the sum of \$100.00 per month; \$50.00 per month to the Brunswick Drug Co.; \$10.00 per month to the Malone estate; also that current taxes and assessments upon Market street property (property under trust deed) and some payments on delinquent taxes be paid, and further hearing was continued to March 15, 1937. The said payments were made except payment of the taxes.

On March 15th, the order was continued until May 20, 1937, and further continuance thereof granted to June 11, 1937. On June 11, 1937, the debtor filed a further sup-

plementary proposed plan, in which two alternative plans were proposed; the third plan duplicated the first plan, except the proposed payment of taxes was changed. The second plan was to pay taxes in full by Jan. 1st, 1938, by the payment of \$140.00 monthly, and the payment of \$1000.00 on the indebtedness either in cash or credit before Jan. 1, 1938. The Referee certified that he has income as follows:

Net receipts from business "based upon figures for period January-November 1936, inclusive" \$154.61 claimed rental value of living quarters at 16th and Market Streets, per annum \$900.00; total \$1054.61

The debtor proposes to pay the following sums:

"Loperena obligations per annum \$1320.00; current taxes on Loperena property \$222.76; 1-10 of delinquent taxes per annum, \$78.09, total \$1620.85."

Upon argument for rehearing it is shown that taxes upon this Drug store property, lots 9 & 10, block 21, are as follows:

"City-light assessments \$471.87; taxes for 1937, \$397.57; taxes delinquent \$1107.64; total \$1977.08 The conceded amount due on the objecting creditors claims, now is principle \$11,750.00 Interest 1/1/34 to 1/1/39, 4 years, at \$822.50, \$3290.00 Interest from 1/1/38 to 2/1/38, @ \$68.54; total \$17,085.62."

To this indebtedness, six \$110.00 payments on order of Referee Dec. 16, 1936, \$660.00 should be credited, leaving a balance due, Feb. 1, 1938, \$16,425.62.

It also appears that this property was sold June 29, 1934, for the delinquent taxes for 1933 and period of redemption is about to expire.

The Drug Store property is valued by the Referee, at \$10,500.00, the indebtedness against this property is \$16,425.62; There is other indebtedness of approximately \$9,100.00.

It is obvious that the proposed plan is not pursued in good faith. The property has not been redeemed from the sale for the 1933 taxes. No interest has been paid any of the indebtedness since Jan. 1st. 1934. The debtor has been, and is now, in possession of all of the property. He has collected \$900.00 per annum rentals from the property other than the store room he occupied. This money belongs to the bankrupt estate and should have been applied to protect the estate. This money in any event, must be accounted for to the estate, by whomsoever received, except such sums as were necessarily expended for the benefit of the estate; and be distributed to the trustee for creditors, or to the general creditors as right may appear. The debtor in his petition for review of the first order herein states no consideration was given to a \$1,000.00 disputed credit claim; nor is the property given a fair market value. In this the debtor is in error. It is clearly shown that the Referee found that no \$1,000.00 payment was made on the Loperena et al. trust deed claim; and if \$1,000.00 was made, it was made on another claim and credited. The claim now made is an afterthought. If payment had been made it would have been asserted when foreclosure of the trust deed was initiated, instead of filing the petition for extension of time for payment under 74 Supra. Nor does the action commenced in July 1937, having relation to this claim, and no process issued there-

on until January 1938, stay this proceeding. The claim of payment may be litigated in this proceeding. The debtor having not applied any of this money collected from the rentals to payment of taxes or interest; and having failed to pay the taxes as per his proposal, or comply with all of the conditions thereof; and not providing for depreciation of the structure in suit is clearly not in a position to invite the aid of a court of conscience. It is also obvious that the aggregate of the debtor's property at a fair valuation is not nearly sufficient in amount to pay his debts.

A bankruptcy court is in a strict sense a court of equity and looks through all matters of form to the underlying essential substance, guided by equitable principles, except as otherwise provided by law; Harris vs. Shafer Co. 10 Fed. (2) 351. In re Derain 260 Fed. 732. In re Young 294 Fed. 1; Merchants Loan & Trust Co. 249 F. 942. Equity in the process of development has assumed the qualities of a composite system. Expansive rather abstract in the settled rules by which rights are measured and process invoked—not always defined. Equity does not create new rights, but affords a remedy for existing rights. The entrance to the portal of equity is not branded, labeled or limited, nor is equity or its process static. A court of equity may contrive new remedies, the remedies at law being inadequate; Joy vs. St. Louis 138 U. S. 1; Berdie et al vs. Kurtz et al (9 Cir) 88 Fed (2) 158. The motion for rehearing is denied.

(b) Upon entering the order denying petition for rehearing, the Referee called a meeting of creditors for Nov.

16, 1937, to elect a trustee. On the 15th of Nov. the petition for rehearing herein denied, was filed. The creditors met at the office of the Referee pursuant to notice on Nov. 16th, and elected a trustee. The debtor seeks a review of the order calling the meeting of creditors claiming that the Referee had no jurisdiction; that upon filing the petition of rehearing, with the permission of a Judge of this court stayed all proceedings. A number of cases are cited but all of the cases are beside the point. The cases cited are where relations between different courts obtained as where a case had been removed to the Circuit Court of Appeals and then pending; the district court, then may not entertain any further proceedings with the case.

The Referee is not a bankruptcy court. All Judges of the Judicial district constitute the bankruptcy court: In re Steele 161 Fed. 886; either one of the Judges of the district, where there are more than one, may function. There are no separate terms in bankruptcy court, In re Buss M. F. C. Co. 217 Fed. 16; In re Barker 233 Fed. 522. The bankruptcy court is always open, Hume vs. Myer's 242 Fed. 827. The Referee is an officer of the bankruptcy court, but is not a separate court, and has no independent judicial power; he has such powers as are given by the order of references and under general orders XII, Weidhown vs. Levy 253 U. S. 268; In re Carl Berg & Son, 51 Fed. (2) 37. It is therefore seen that the contention of the petitioner is mythical. It is further contended that the motion for rehearing having been filed with permission of a Judge, stayed all proceedings under the order sought to be reviewed and that the Referee had

no jurisdiction to proceed after the filing of such petition. Since under Sec. 840 Title 28 USCA all proceedings were stayed. This position is unattainable.

"* * * execution may on motion of either party, at the discretion of the court, and on such conditions for the securing of adverse party, as it may judge proper, be stayed. * * *" that is the full meaning of this section: the purpose of the stay is then provided for (a) to give time to file a motion for a new trial etc. (b) if the motion for a new trial is filed, the stay previously given, shall be further stayed until the next session of the court. The phrase further stayed clearly is predicated on the prior stay for which security has been given. If such is not the meaning, then all the section is surplussage except, if a petition is presented and allowed to be filed by the Judge, the judgement shall be stayed. In the instant case the petition for a rehearing did pray a stay of the order, but the stay was not granted. The stay order is not a matter of right, but is purely discretionary with the court and intended only for the purpose of holding the rights of the parties in statu quo, pending the steps for a new trial or appeal, as they might be advised. Lineker v. Dillom 275 Fed. 364. Sec. 840 Title 28 USCA.

The petition for review is denied.

Jeremiah Neterer

JEREMIAH NETERER

U. S. District Judge.

[Endorsed]: Filed Feb. 17, 1938. R. S. Zimmerman,
Clerk By R. B. Clifton, Deputy.

[TITLE OF DISTRICT COURT AND CAUSE.]

CERTIFICATE OF SPECIAL MASTER UPON
SETTLEMENT OF STATEMENT OF EVI-
DENCE.

The matter of the settlement of the Statement of Evidence to be used upon appeal in the above-entitled matter was, by order of the Court of June 9, 1938, referred to the undersigned as Special Master with directions that further proceedings for the preparation and settlement of the Statement of Evidence herein under Equity Rule 75 be had before said Special Master. Pursuant to said order hearings upon the objections to said proposed Statement were had before the Special Master on June 11, 1938; June 15, 1938 and July 1, 1938, at all of which hearings the bankrupt was represented by J. Earl Haskins, as his attorney; the objecting creditors were represented by Fred Noon, and upon July 1, 1938 Fred Steiner also appeared as attorney for said creditors.

Amendments have been made in said proposed Statement and an Engrossed Statement of the Evidence has been prepared; is attached hereto, and I, as such Special Master, DO HEREBY CERTIFY to the Court that the attached engrossed Statement of Evidence is the Statement that has been settled by me pursuant to the directions contained in said order of the Court of June 9, 1938.

Dated July 5, 1938.

Stanley T. Howe
Referee in Bankruptcy, as Special Master.

[TITLE OF DISTRICT COURT AND CAUSE.]

NOTICE OF LODGMENT OF STATEMENT
OF EVIDENCE.

TO THE APPELLEES HEREIN, AND TO THEIR
ATTORNEYS OF RECORD, NOON AND
NOON:

YOU AND EACH OF YOU WILL PLEASE TAKE
NOTICE that Appellant has prepared a Statement of
Evidence in the above entitled Appeal, pursuant to Equity
Rule 75 (28 USCA P723), and has this day lodged the
same with the Clerk of the above entitled Court.

Appellant will apply to said Court, before the Honorable Paul J. McCormick, to approve said Statement of Evidence and make it part of the record on appeal herein, on the 9th day of June, 1938, at 1:30 o'clock P. M., or as soon thereafter as counsel can be heard.

DATED: May 27th, 1938.

J. EARL HASKINS and
CHARLES PECKHAM,
By J Earl Haskins
Attorneys for Appellant.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 53
min. past 11 o'clock May 28, 1938 A. M., By M. J. Sommer,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ENGROSSED STATEMENT OF EVIDENCE

BE IT REMEMBERED that heretofore, to-wit: on the 17th day of February, 1938, the Honorable Jeremiah Neterer, District Judge, rendered his decision denying Petition to Review an Order of this court affirming an Order made October 15, 1937, in open court, and filed October 25, 1937, which Order affirmed a ruling of the Referee made and entered June 14, 1937, denying debtor's proposal for extension of time within which to pay his obligations and vacated a Stay of proceedings under the Order of Adjudication and Reference made August 21, 1936, which Order Staying proceedings was granted by the Honorable Paul J. McCormick, District Judge, October 16, 1936.

BE IT REMEMBERED FURTHER that the aforesaid Petition for Rehearing of the Order of October 25, 1937, was "seasonably presented", and "entertained" by the above entitled court and permission to file same was granted by Honorable Ralph E. Jenney, District Judge, November 15, 1937, on which date said Petition was also filed with the Clerk of the District Court.

That at the aforesaid hearings, Lamont William Bowman, was represented by his counsel, J. EARL HASKINS and CHARLES PECKHAM, and that the secured creditor Loperenas', which creditor was the only objectionist, was represented by FRED NOON, Esq. That no other creditor filed objections and no other parties, or their attorneys, were present or took part in any of the aforesaid proceedings.

The following is a summary of the procedure, facts and evidence out of which the Order, dated February 17, 1938, denying a Rehearing, arose.

On May 23, 1935, Lamont William Bowman, as debtor, filed his Petition under Section 74 of the Bankruptcy Act, praying for an Order of extension of time in which to pay his obligations; that June 4, 1935, schedules were filed; July 6, 1935, debtor filed extension proposal; which proposal was consented to by all of the creditors both in number and in amount except that alleged obligation evidenced by a promissory note secured by Deed of Trust upon real property in which debtor conducted his drug and pharmacy business, located at 1538 Market Street, San Diego, California, the legal description of which is:

Lots 7 and 8, in Block 2, of Shermans' Addition, according to Map thereof No. 856, filed in the office of the County Recorder of San Diego County, California, on February 2, 1899,

which note and Deed of Trust was owned by Martin Loperena as to an undivided one-half (1/2) interest; Grogoria Loperena; as to an undivided one-fourth (1/4) interest; and Phyllis Bouton and Martin Loperena, Jr., as to an undivided one-fourth (1/4) interest. That said Loperenas' acting in the capacity of a single creditor, objected to the extension proposal of debtor on the grounds that they, the Loperenas', owned more than fifty (50) percent in amount of all obligations of debtor; debtor's extension proposal was denied upon that ground by the Referee and an Order was so filed.

On June 22, 1935, Notice of first meeting of Creditors in proceedings under Section 74, in the above entitled matter, was duly and regularly published and meeting of

creditors held on July 6, 1935; that the time for filing claims in said estate expired December 22, 1935.

On July 26, 1935, an Order was made by the Referee denying confirmation of extension proposal which Order was filed September 16, 1935, together with a Petition for Review and Referee's Certificate thereon.

On May 15, 1935, the Honorable Leon Yankwich, made his Order reversing the Order of the Referee made July 26, 1935, and referred the matter to the Referee in Bankruptcy for further proceedings.

Debtor's supplemental proposal for extension of time was filed and thereafter objections were filed by Martin Loperena, et al; a hearing was had by creditors on said extension proposal, August 8, 1936, and was consented to by all creditors both secured and unsecured with the exception of Martin Loperena, et al.

August 19, 1936, Referee filed with the District Judge, a Certificate on debtor's Petition for Extension which Certificate specifically set forth that Stanley T. Howe, Referee in Bankruptcy, had not made any specific Order but had only recommended "That the proposal, or proposals, of the debtor for an extension, under Section 74 of the Bankruptcy Act, be not confirmed, and that the debtor be adjudicated a bankrupt."

That the aforesaid recommendation was sent forthwith to the Clerk of the District Court and on Friday, August 21, 1936, at Los Angeles, California, the following Minute Order was made and entered:

"In the Matter of Adjudication and
Order of Reference in Bankruptcy")

The court having duly considered the Petitions in Bankruptcy filed and having determined that all the conditions prescribed by law have been complied with, and that adjudication in bankruptcy shall be made; it is hereby ordered that the Clerk make and sign Orders of Adjudication and Reference to the Referee in the cases noted and entitled as follows:

* * * * *

and the Court having been duly considered and Certificate of the Referee's recommending that the debtor be adjudged a bankrupt, it is hereby ordered that the Clerk make and sign an Order of Adjudication and Reference in the case No. 1048, Lamont William Bowman.

ALBERT LEE STEPHENS,

United States District Judge."

That Adjudication and Order of Reference was filed August 21, 1936.

That on August 26, 1936, a Notice of first meeting of creditors was duly and regularly published by virtue of the Order of Adjudication and Reference made August 21, 1936. The first meeting of creditors being then and there set for September 8, 1936. That said Notice further advised "that the time for filing claims in this estate has expired."

August 27, 1936, Lamont William Bowman, as debtor, filed a Petition for Review of Referee's Order; September 24, 1936, statements of Referee relative to the Petition for Review, was filed. In said statement the Referee specifically set forth as follows:

"Said Petition for Review, with the supplemental proposal for extension which is made a part thereof, is herewith returned to your Honorable Court without a statement and Certificate on review for the reason that the undersigned, as Referee in Bankruptcy, has made no Order, the review of which is sought in this proceeding by the debtor."

September 10, 1936, debtor filed a Petition for Re-hearing and prayed that Order of Adjudication theretofore made be vacated; September 14, 1936, objections to Petition for Re-hearing were filed by objecting secured creditor Loperenas'.

October 14, 1936, debtor filed Notice of Motion for Order to Set Aside and Vacate Order of Adjudication and to dismiss without prejudice.

October 16, 1936, objections heretofore filed by objecting creditors Loperenas' to Petition for Re-hearing came on regularly for hearing before the Honorable Paul J. McCormick, District Judge, at San Diego, California. At said hearing there were present, J. Earl Haskins, as the attorney for Lamont William Bowman and Fred Noon, Esq., as the attorney for the secured objecting creditor Loperenas'.

That after said Motions had been presented to the Court and duly considered, the Honorable Paul J. McCormick, District Judge, presiding, made and entered his order re-referring the entire matter to the Referee and particularly setting forth in his order that— "Any

further proceedings under the adjudication and Order of Reference under Section 74, entered on August 21, 1936, be Stayed until further Order of this Court, made by a Judge thereof."

December 16, 1936, Stanley T. Howe, as Referee in Bankruptcy, made and entered his interlocutory order extending the time for further hearing on debtor's supplemental extension proposal to March 15, 1937; on March 15, 1936, hearing of debtor's original and supplemental Petitions for extension were continued to May 20, 1937; May 20, 1937, an Order was made extending time for hearing of debtor's extension proposal to June 11, 1937; that prior to June 11, 1937, objecting creditors Loperenas' filed their objections to said extension proposal.

June 14, 1937, an Order was made by Stanley T. Howe, Referee in Bankruptcy, denying Petition for extension and of confirmation of proposal therefor.

That within the time allowed by law, and extension of time duly and regularly Ordered, had and obtained, debtor filed a Petition for Review of Referee's Order of June 14, 1937, denying extension proposal of debtor; August 17, 1937, Referee filed Certificate of Review of Order on June 14, 1937; objections to Petition for Review were thereupon filed by secured creditors Loperenas'.

October 15, 1937, Petition for Review came on for hearing before Honorable Jeremiah Neterer, District Judge; Lamont William Bowman, being represented by J. Earl Haskins and Charles Peckham, his attorneys and

objecting secured creditors Lóperenas' being represented by Fred Noon, Esq.

October 25, 1937, the Honorable Jeremiah Neterer made his Order confirming the Order of the Referee, denying Extension Proposal made under date of June 14, 1937, and further Vacated, Set Aside and Quashed the Stay of Proceedings under Order of Adjudication and Reference entered October 16, 1936, and directed the Referee to proceed under the Order of Adjudication and Reference.

November 15, 1937, Petition of debtor for Re-hearing was "seasonably presented" and "entertained" by the court and permission to file said Petition for Re-hearing was granted by the Honorable Ralph E. Jenney, District Judge; said Petition was filed with the District Clerk November 15, 1937.

February 10, 1938, Petition for Re-hearing came on for hearing. Present: Lamont W. Bowman, being represented by his attorneys J. Earl Haskins and Charles Peckham, and objecting secured creditors, Loperenas' being represented by their attorney Fred Noon, Esq.

February 17, 1938, Honorable Jeremiah Neterer made and entered his decision and opinion, which decision denied the Motion for Re-hearing.

That exceptions to all decisions and rulings of the court were reserved and noted.

CLAIMS

The following and no other, are the claims proved against said estate, together with the names and addresses of the proving creditors, to-wit:

Claimant	Filed	Allowed Amount	Attorney
Los Angeles Soap Co. 617 E. 1st St. L. A.	Jun-17-35	10.00	Craig & Miller
C. R. Hammond (Auditor) Spreckles Theatre Bldg. San Diego, California. (This claim is for unpaid state and county taxes due at time of filing claim)	Aug- 8-35	449.98	Direct
Charles L. Sloane 2143 Market Street, San Diego, California.	Aug-22-35	1700.00	Harrison G. Sloane
Charles L. Sloane 2143 Market Street, San Diego, Calif.	Aug-22-35	250.00	Harrison G. Sloane
Brunswig Drug Company, P. O. Box 176, Los Angeles, Calif.	Aug-26-35	5213.07	Direct

(Testimony of Lamont William Bowman)

TESTIMONY

LAMONT WILLIAM BOWMAN

testified substantially as follows:

During the month of March, 1925, I entered into an agreement with Martin Loperena for the purchase of the real property and improvements thereon located at 1538 Market Street, in the City of San Diego, San Diego County, State of California. The legal description of said property being:

Lots 7 and 8 in Block 2 of Shermans Addition of the City of San Diego.

I agreed to buy the property for the sum of Thirty Thousand and no/100 (\$30,000.00) Dollars, and paid Martin Loperena the sum of One Thousand and no/100 (\$1,000.00) Dollars on account to bind the bargain. In April, 1925, I paid the sum of Five Thousand and no/100 (\$5,000.00) Dollars, through an escrow, and Dorothy Bowman, my wife, and myself, executed on April 24, 1925, a promissory note in the sum of Twenty-five Thousand and no/100 (\$25,000.00) Dollars, bearing interest at the rate of Seven (7%) percent per annum on deferred payments, secured by Deed of Trust on the aforesaid property. Martin Loperena told me that he would credit the One Thousand and no/100 (\$1,000.00) Dollars, I had paid him on account of his undivided one-half (1/2) interest. I made payments to the said Loperenas', beginning with the date of September 9, 1925, in the amount of \$820.85; thereafter on October 1, 1925, I paid the sum of \$928.75; February 2, 1926, I paid the sum of \$920.00; April 1, 1926, I paid the sum of \$911.25; July 2, 1926, I

(Testimony of Lamont William Bowman)

paid \$902.50; October 1, 1926, I paid \$893.75; January 3, 1927, I paid \$885.00; April 1, 1927, I paid \$876.25; July 1, 1927, I paid \$867.50; October 4, 1927, I paid \$858.75; January 1, 1928, I paid \$850.00; April 4, 1928, I paid \$841.25; July 3, 1928, paid \$832.50; October 1, 1928; paid \$823.75, January 2, 1929, paid \$815.00; April 3, 1929, paid \$806.25; July 3, I paid \$797.50; October 2, 1929, I paid \$788.75; February 2, 1930, I paid \$780.00; April 2, 1930, paid \$771.25; July 2, 1930, paid \$762.50; October 2, 1930, paid \$753.75; January 3, 1931, paid \$745.00; April 1, 1931, paid \$236.25; July 3, 1931, paid \$236.25; October 6, 1931, paid \$721.50; February 2, 1932, paid \$727.50; April 1, 1932, paid \$468.75; July 5, 1931, paid \$464.37; October 5, 1932, paid \$460.00; January 5, 1933, paid \$205.63; May 22, 1933, paid \$207.71; September 11, 1933, paid \$208.59; November 28, 1933, I paid \$207.96; and April 6, 1934, I paid \$209.25; July 1, 1934, I paid \$514.86.

That up to said date of July 1, 1934, in addition to the \$1,000.00, I had previously paid Martin Loperéna, I paid a total sum of \$28,591.75, of which \$18,250.00, was credited on principal and the remaining amounts, upon interest.

That during the course of the present proceedings, I was ordered to pay on account of the interlocutory order made December 16, 1936, by the Referee in Bankruptcy, the sum of \$110.00, per month on account of the unpaid balance due on the note secured by the Deed of Trust. In accordance with said order, I paid six payments including the payment that was due June 16, 1937; total payments made, being \$660.00.

(Testimony of Lambeth William Bowman)

I am the sole owner and proprietor of a drug and pharmacy business located in the building upon which the Loperenas' have their Deed of Trust. During the years of 1922 to April 1930, my gross receipts from said business were about \$3,500.00 per month. That after the year 1931, my gross receipts dropped considerably, and in 1934, I was not taking in gross, over \$1,500.00 to \$2,200.00, per month, and that my net profits, after paying all expenses, are approximately \$350.00 per month.

I met with serious financial reverses in another business venture, in which I was interested in 1934, and suffered a large financial loss. The fall of the same year, I sustained a serious automobile accident and was in the hospital a number of months. During which time an indebtedness was created with the Brunswig Drug Company, from whom I was making substantially all wholesale purchases, so that on September 5, 1934, it was necessary for me to execute an agreement with the Brunswig Drug Company, wherein I transferred title to all fixtures, stock in trade, and business, to the said Brunswig Drug Company, and the Brunswig Drug Company, entered into an agreement with me to re-sell said business to me upon a conditional sales agreement for the sum of \$5,223.09, payable at the rate of \$100.00, per month beginning November 1, 1934, together with interest on said sum at the rate of 7% per annum.

All of my income has been solely from the drug and pharmacy business conducted by me at this location during the past seventeen years. During this same period of time, I purchased another piece of real property known as:

(Testimony of Lamont William Bowman)

Lot 7 in the North one-half of Lot 2, Block 7, Copperwells Addition to the City of San Diego.

which property has ever since May of 1935, been of the reasonable value of \$7,500.00, or more. Prior to May, 1935, in order to secure the Security Trust and Savings Bank of San Diego, for an unsecured loan of \$1,400.00, which I had previously made and also to secure an additional loan of \$1,700.00, which I had previously made with Charles L. Sloan of San Diego, I executed notes for \$1,400.00, and \$1,700.00, both secured by Deeds of Trust on this last named parcel of real property. Said property was leased for the sum of \$50.00, per month for an oil station in 1936, and the obligation to the Security Trust and Savings Bank of San Diego, has been reduced now to approximately \$700.00. That the payment of \$50.00, per month is being made to the aforesaid bank.

I have purchased and installed fixtures in the building to conduct my drug and pharmacy business which cost me over \$8,000.00, and that said fixtures are substantially valueless if I have to remove the same from the building in which they are now located.

The reasonable value of my business, fixtures and stock-in-trade is over \$10,000.00. I have paid all state and county taxes on the real and personal property owned by me in full, with the exception of the parcel known as Lots 7 and 8, Block 2, Shermans Addition, upon which the Loperenas' have a Deed of Trust. That the reasonable value of the real estate and improvements known as Lots 7 and 8, Block 2, Shermans Addition, upon which the Loperenas' have a Deed of Trust is over \$20,000.00. That the reasonable value of the property known as Lot

(Testimony of Lamont William Bowman)

1 and the North One-half (1/2) of Block 2 of Culverwells Addition, is the reasonable value of \$7,500.00.

In July of 1935, divorce action was commenced between Mrs. Bowman and myself and subsequently I was ordered to pay the sum of \$50.00 temporary alimony, and \$250.00, attorneys fees. At a final hearing on said divorce proceedings I was ordered to pay the sum of \$75.00, permanent alimony. Prior to the time of said interlocutory judgment of \$75.00, per month, Mrs. Bowman became seriously ill with arthritis, and I paid out the sum of \$526.70, during the summer and fall of 1936, for hospitalization for Mrs. Bowman.

I did not know that Loperenas' had recorded a Notice of Default on the Deed of Trust secured by Lots 7 and 8, Block 17, Shermans Addition, until on or about the month of March, 1935. I immediately instructed J. Earl Haskins as my attorney, to file a Petition under the Moratorium Assembly Bill No. 23, and that said action was actually filed in Superior Court in San Diego County as Action No. 80901. The Loperenas', through their attorney, Fred Noon, Esq., interposed a Demurrer to said Petition on the grounds that the action had been filed too late, and that the court was without jurisdiction to hear it. Said action was thereupon dismissed. Juan Loperena has died since the execution of the Deed of Trust and Martin Loperene, Jr., and *Filicinia* Bouton, had succeeded to the interest of Juan Loperena.

There was at one time some compromise talked of between the Loperenas' and myself and this compromise comprehended signing of a paper by me, the result of which would have been that had there been any default

(Testimony of Lamont William Bowman)

on my part in the carrying out of this compromise agreement, I would have forthwith lost all interest I had in the property and because of this fact, I refused to consummate the agreement. This agreement to which I refer required that I pay \$125.00 a month, plus taxes on the property.

Notice of Default had been recorded by the Trustee of said Deed of Trust on or about January 16, 1935, and said property was Noticed for Sale May 24, 1935. On May 21, 1935, I authorized J. Earl Haskins, as my attorney, to prepare and file a Petition under Section 74 of the Bankruptcy Act. A Restraining Order was also prepared, restraining the sale set for May 24, 1935, which restraining order was executed by Honorable William P. James, District Judge.

At the first meeting of creditors held in July, 1935, and at all other meetings, my other creditors agreed to the extension proposal which I had submitted, but the Loperenas' refused to give their consent.

Lamont William Bowman further testified that during the course of these proceedings, that all small claims have been paid in full and that there is only one unsecured claim proved in his estate, which is represented by a promissory note, dated on or about April, 1935, in favor of Charles L. Sloane, in the sum of \$250.00, together with interest thereon at the rate of 7% per annum, from April, 1935.

(Testimony of Paul Ward)

PAUL WARD,

a witness called by the objecting creditors, testified in substance as follows: I am one of the Inheritance Tax appraisers for the State of California. I made an appraisal of the Bowman property, lots 7 and 8, Block 2, Sherman's Addition, located at 16th and Market Streets, on December 11, 1936. The fair market value of that property at this time is \$9,000.00. The lots are 50 by 100 each, making 100 by 100 in all. One building on the property is two-story, with a drug store downstairs and apartments upstairs. The value of the building is \$3,000.00. It is an old building that has been remodelled and restuccoed on the outside. The building is approximately 50 feet wide, and 100 feet long. The building is very old; it has the appearance on the outside of being a fair building, but on examining the inside, I found it in very poor condition. I thought that the building on the corner covered the entire property. There is a building to the west of the drug store building, and if that building is on this ground it would have to be included in appraising the property. The value of the lots is \$6,000.00, and the value of the building \$3,000.00. I was evidently mistaken, if there are two buildings on this property. The property isn't worth nearly as much today as it was in 1925. The store building should be rented for \$40.00 a month, and the apartments upstairs should lease for about \$35.00 a month; I would say that would be a fair rental income for the upstairs. The corner lot is worth \$4,000.00, and the inside 50 feet \$2,000.00. I saw a two-story frame building at the rear of the drug store building, and that is worth \$1,500.00. I will change my appraisal to

(Testimony of Howard Ritter)

\$10,500.00, including the other building. My appraisal considers that the building is free and clear. I didn't consider back taxes or anything of that sort. I have been an Inheritance Tax Appraiser for seven years, and have been in real estate work in San Diego since 1912, with the exception of three years spent in War service. I know of no sales of property in that immediate vicinity but my valuation is what a willing seller would sell the property for and what a willing buyer would pay for the property.

HOWARD RITTER,

a witness produced by the debtor, testified substantially as follows: I am the assistant cashier of the Security Trust and Savings Bank of San Diego, California. The records of the Bank show that payments were made to the Bank by L. W. Bowman on two different notes, one for \$25,000.00, and the other for \$3,500.00. The records from which I am testifying include payments on both notes. On September 26, 1935, when the \$25,000.00, note was withdrawn from the Bank, the total indebtedness was \$11,750.00. The bank records show the following payments by L. W. Bowman: Payment to the Bank July 5, 1932, interest to July 1, 1932, \$214.37; and \$250.00 on principal, total \$464.37, represented by check No. 1105 dated July 5, 1932. April 1, 1932, interest to April 1, 1932, \$218.75, and \$250.00 to apply on principal, total \$468.75, represented by check No. 999 signed by L. W. Bowman and payable to the Bank. January 6, 1932, interest to January 1, 1932, \$227.50, and \$500.00 to apply on principal, \$727.50, represented by check No. 888 signed

(Testimony of Phyllis Bouton)

by L. W. Bowman, October 6, 1931, interest to October 1, 1931, \$236.25, and \$500.00 on principal, total \$736.25, which amount less \$8.75, a credit for overcharge of interest, is represented by check No. 758 for \$727.50, signed by Mr. Bowman. July 31, 1931, interest to July 1, \$218.76, and \$500.00 on principal, \$718.76, represented by check No. 626 of Mr. Bowman. April 1, 1931, interest \$253.75, to April 1, 1931, and \$500.00 on principal, \$753.75, represented by check without number of that date. There is also a payment on April 2, 1930, of interest to April 1, 1930, \$288.75, and \$500.00; on principal; \$500.00 credited on the original note on April 2, 1930.

PHYLLIS BOUTON,

one of the objecting creditors, testified in substance as follows: I went to the County Auditor's office and requested a statement of the delinquent taxes on the property occupied by Mr. Bowman at 16th and Market Streets. A statement was given to me at that time which I now identify as objecting creditors' exhibit B. I was advised that delinquent taxes on that property amounted to \$862.98 up to December 31, 1936. The taxes for 1936 amount to \$222.76. The statement therefor I identify as objecting creditors' exhibit C. Mr. Bowman has never offered to pay any money to us that was refused. Mr. Bowman did offer in 1935 to deed the property over to us, and when he brought the taxes up to date and kept paying the

(Testimony of Gregorio Loperena)

\$100.00 a month, and we were satisfied, then we would deed the property back to him. Mr. Bowman didn't carry out the offer. We did accept that proposition but he didn't deed the property over to us nor did he make any payment of money. He deposited \$500.00 in the Bank in accordance with the offer but he drew it out because somebody told him he would be an idiot if he did that; that was the last we heard of that. A demand was made upon Mr. Bowman that he pay up the interest and taxes before the Union Trust Company started to foreclose our trust deed.

GREGORIO LOPERENA,

one of the objecting creditors, testified in substance as follows: Since May, 1935, Mr. Bowman has made no payment on account of principal or interest on the obligation owed to us by him. Mr. Bowman made all payments to the Bank. I don't remember when the last payment of interest was made but I think it was in April, 1934. Bowman never did offer me any money for either principal or interest on our obligation that I refused to take. Mr. Bowman never did make me a proposition privately but he made one at the Bank and he deposited some money in the Bank for back payments. I don't know how much he deposited in the bank but he drew it out.

(Testimony of Harold R. Conklin—Martin Loperena)

HAROLD R. CONKLIN,

a witness produced by the debtor, testified in substance as follows: I am the attorney for the Union Trust Company, of San Diego. The declaration of default on the Loperena Trust Deed note, and the notice thereon, was recorded January 15, 1935. At the time of the declaration of default the unpaid principal of the note was \$11,750.00. The interest due on the note on April 1, 1934 was not paid. This note is dated April 24, 1925, and the principal amount thereof is payable in installments of \$500.00, or more, the first day of every third month commencing July 1, 1925. The original amount of the note was \$25,000.00, with interest at 7% per annum, payable quarterly. Payments had been made to October 1932, at which time the principal was \$11,750.00. Since that time there have been no payments made on the principal but there have been five payments made on interest ranging around \$205.00, to \$209.00 each, and one pencil notation of a payment of some kind 7/1/34—\$514.76.

MARTIN LOPERENA,

one of the objecting creditors, testified substantially as follows: I never did receive any offer of money from Mr. Bowman I refused to accept. I accepted the provisions contained in objecting creditors' exhibit A. We were ready to go ahead with the deal and make a contract to deed the property back to him after he had deeded it to us, but he withdrew the money.

[Photostatic copies of Objecting Creditors' Exhibits A, B and C are hereto attached.]

FINDINGS OF THE REFEREE

The Certificate of the Referee on debtor's Petition for Extension which was filed with the District Court, August 19, 1936, and the Certificate of the Referee made pursuant to the Order denying extension proposals on June 14, 1937, and the Certificate of the Referee on Petition for Review from said Order filed August 17, 1937, specifically set forth that: "The plan for extension proposed by the debtor herein does not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself," but in none of the Certificates of the Referee or the Orders made by the Referee, pursuant to the evidence introduced at all of said proceedings and heard and considered by the Referee, is there any finding that the debtor "Commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy."

WHEREFORE, appellant prays that the statement of evidence hereinabove, be settled, approved and allowed by the above entitled court as a true, full, correct and complete statement of all of the evidence considered by said court upon the various hearings held on this matter before the Honorable Referee, and the Honorable District Judges herein, for use on Appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated:

J. EARL HASKINS AND CHARLES PECKHAM

By J. Earl Haskins

Attorneys for Appellant.

ORDER

The foregoing statement of evidence is in all respects approved and settled as the evidence considered by this court.

Dated July 7th 1938 at 4 45 P. M.

Paul J McCormick
Judge of the District Court.

San Diego, California,

May 20, 1935.

To Messrs: Martin Loperena,
Gregorio Loperena,
Martin J. Loperena,
and Mrs. Phyllis Bouton:

Reference is made to Trust Deed foreclosure proceedings now pending, covering the property at the northwest corner of Sixteen and Market Streets.

In order to stop the foreclosure proceedings, I propose the following:

I will make payment of Five Hundred Dollars (\$500.00) in cash, to be applied on the payment of your attorney's fees and costs, amounting to \$57.00, delinquent lighting assessments, delinquent improvement bond payments, and costs of Trustees foreclosure fees and expenses. I also propose to make payments of \$125.00 or more per month, beginning July 1st, 1935, which payments shall be applied on account of principal and interest of the present indebtedness.

I further propose to deed the property over to you upon your executing an agreement that you will deed the property back to me on January 2, 1936, provided I have by that time paid up all delinquent taxes, improvement bond payments, lighting assessments, etc., and provided I have made the monthly payments of \$125.00 as proposed herein.

Upon your deeding the property back to me, I will execute and deliver to you a Trust Deed for the amount of the unpaid principal and interest due at that time, less the amount of the monthly payments made by me, which note will be payable at the rate of \$125.00 or more per month, including interest at the rate of seven percent. per annum, with the unpaid balance maturing five years from its date.

Respectfully submitted,

L. W. Bowman

No. 1048. In Bankruptcy. In re Lamont William Bowman, Debtor. Objecting Creditor's Exhibit "A". Filed December 11, 1936 at 4:47 P.M. Stanley T. Howe, Referee.

NO. 47917

Book 5 Page 84

OFFICE OF COUNTY AUDITOR-CONTROLLER
COUNTY OF SAN DIEGOReceipt for Conditional Payment off Account of Delinquent
Taxes

When properly stamped by the County Treasurer this becomes a receipt under the provisions of the Political Code for a payment which may be applied on redemption of the within described property which was sold to the State on the 28 day of J—, 1934, for the delinquent taxes of 1933

ASSESSED TO Lamont W Bowman in S Div Schcol
District.

DESCRIPTION OF REAL ESTATE: Shermans Addn
lots 7 & 8 Blk 2

1934 = 342.10

1935 = 331.00

673.10

4/20/35

PERSONAL CHECKS NOT ACCEPTED.

Balance of tax under former plan 114.94 less Int

7.06	\$107 88
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Amount of Delinquent taxes for the years 1934

to 1935.....	673 10
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Total Taxes.....	780. 98
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Amount of interest from 7/1, 1935.....	82 00
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Total amount of this payment Good to

12/31/36	862.98
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I, R. W. GETTY, County Auditor-Controller, in and for said County, State of California, do hereby certify that the foregoing statement contains a full and correct estimate of the amount of unpaid taxes as shown by the delinquent rolls in my office, and that the payment shown hereon is in accordance with the provisions of the Political Code.

R. W. GETTY, County Auditor-Controller,

....., 193..... By ASG., Deputy..

Payment No. Final

[On Reverse Side]:

PARTIAL PAYMENT PLAN OF REDEMPTION

Provisions of the Political Code

This method of payment must be adopted on or before April 20, 1936.

The payments made hereunder are construed as rental for the use and occupancy of the property; however, said payments are credited on the redemption if and when it is finally made.

All of the current tax must be paid for each fiscal year on or before April 20th of each year in addition to the payment which consists of 1/10 or more, of taxes past due, plus interest at 7% per annum to date of payment.

These payments may be made as often as desired.

So long as payments are kept up the property will not be subject to sale by the State.

For further information, write
or Phone Frank. 1321

R. W. GETTY, County Auditor-Controller,

Local 28 Room 3 Court House,
Local 33 San Diego, Calif.

[Written in ink]: 869

862 98

222.76

1085.84 = To date

No. 1048. In Bankruptcy. In re Lamont William Bowman, Debtor. Objecting Creditor's Exhibit "B". Filed December 14, 1936 at 2:26 P.M. Stanley T. Howe, Referee.

(Photostat)

No. 1048. In Bankruptcy. In re Lamont William Bowman, Debtor. Objecting Creditor's Exhibit "C". Filed December 14, 1936 at 2:29 P.M. Stanley T. Howe, Referee.

[Endorsed]: Lodged R. S. Zimmerman, Clerk 9 min:
past 5 o'clock Jul - 6 1938 PM By F. J. Betz Deputy
Clerk. Filed Jul .7 1938 at 4:20 p m R. S. Zimmerman,
Clerk By Edmund L. Smith Deputy Clerk.

1936-TAX BILL-1936

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THE BAPTIST ON EAST SIDE WASHINGTON

MARIN COUNTY, CALIFORNIA

SECOND INSTALLMENT

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JAM A. CLAGGE 11
COUNTRY TAX COLLECTOR.
Handling all Tax Bills, Tax Deeds, etc.

100

11

RECORD. *Dental Assistant*, January 20, 1921—Deliverman; April 10, 1921, at 9 A.M., \$3 and 50 cents on each hour, added thereto, 5¢ additional to first consultation.

	date	TOTAL VAN	PER	PER
2/20.	2/14	2.0	107.0	107.00
2/21.	2/17	1.7	85.0	85.00
2/22.	2/18	1.6	78.0	78.00
2/23.	2/19	1.6	78.0	78.00

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DO NOT PAY

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**TOTAL PAYMENT
RECEIVED HERE**

11

COPY

IMPORTANT

Do Not Detach This Stub

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IMPORTANT — Please Read Other Side Carefully for Information.

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No. 104. In Bankruptcy.
In re Lament William Bowen, Debtor;
Objecting Creditor's Exhibit "C".
Filed December 14, 1936 at 2:39 P.M.
Stanley T. Howe, Referee.

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IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION

IN THE MATTER OF) NO. 1048
) PETITION
) FOR APPEAL
LAMONT WILLIAM BOWMAN,) TO CIRCUIT
) COURT OF
Debtor.) APPEALS
) (NINTH
) CIRCUIT)

TO THE HONORABLE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION:

LAMONT WILLIAM BOWMAN; petitioner herein, considering himself aggrieved by that certain order rendered October 15, 1937 (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supplementary petitions for relief under Section 74 of the Bankruptcy Act, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a \$1,000.00 credit on a note

secured by a purchase money trust deed in favor of the "secured" creditors (Loperenas'), for the reasons specified in the Assignment of Errors, which is filed simultaneously herewith, and prays that this appeal may be allowed; that a citation be issued directed to Martin Loperena and Gregoria Loperena, his wife, Gregorio Loperena and Sebastiana Loperena, his wife, Martin J. Loperena and Phyllis Feliciana Bouton, commanding them, and each of them, to appear before the said Circuit Court of Appeals to do and receive that which may appertain to justice to be done in the premises; that a transcript of the records, papers, proceedings, arguments, offers, stipulations and evidence upon which said order or orders, judgment or judgments, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DATED: This 18th day of March, 1938.

LAMONT WILLIAM BOWMAN, Appellant

BY J. EARL HASKINS and

CHARLES PECKHAM

BY J. EARL HASKINS

His Attorneys.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION)
) SS.
COUNTY OF LOS ANGELES)

J. EARL HASKINS, being first duly sworn, deposes and says:

That he is one of the attorneys for petitioner in the foregoing petition; that he has read the said petition and believes the same to be true; that said petitioner is absent from and is a non-resident of the County of Los Angeles, State of California, wherein your affiant maintains his office; and that affiant makes this affidavit for the reason that said petitioner is absent from and is a non-resident of the said County of Los Angeles.

J. Earl Haskins

Subscribed and sworn to before me, this 18th day of March, 1938.

[Seal]

Catherine F. Williams

Notary Public in and for the County of Los Angeles, State of California.

IT IS ORDERED that the appeal herein be allowed as prayed for and that a transcript of the record and of all papers, proceedings, arguments, offers, stipulations and evidence upon which said order or orders, judgment or judgments, is based be transmitted to the Circuit Court of Appeals, Ninth *District*, and that petitioner's cost bond be fixed in the sum of \$250/00.

Dated: March 18 - 1938.

Paul J. McCormick
United States District Judge.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 19 min.
past 1 o'clock Mar. 18, 1938 A.M., By M. J. Sommer,
Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ASSIGNMENT OR ERRORS.

COMES NOW LAMONT WILLIAM BOWMAN, petitioner and appellant, and files this his Assignment of Errors, complaining as follows:

I

- (a) The District Court erred in adjudicating the debtor a bankrupt on August 21, 1936, and thus confirming the erroneous recommendation of the Referee of August 19, 1936, (who acted as Special Master), the Referee having failed to make an order denying confirmation of debtor's extension proposal.
- (b) That said adjudication is contrary to law.
- (c) That said adjudication is contrary to the evidence.
- (d) That said recommendation is contrary to law.
- (e) That said recommendation is contrary to the evidence.

II

- (a) The District Court erred in making its interlocutory order of October 16, 1936, by denying motion of debtor to vacate said adjudication.
- (b) By denying motion of debtor to dismiss proceedings without prejudice to re-filing.
- (c) That said orders of court are contrary to law.
- (d) That said orders of court are contrary to the evidence.

III

- (a) The District Court erred in making its order of October 15, 1937, confirming the order of the District

Court made August 21, 1936, adjudicating the debtor a bankrupt.

- (b) That said order is contrary to law.
- (c) That said order is contrary to the evidence.

IV

(a) The District Court erred in making its order of October 15, 1937, by vacating the Interlocutory order of the District Court of October 16, 1936.

- (b) That said order is contrary to law.
- (c) That said order is contrary to the evidence.

V

(a) The District Court erred in making its order of October 15, 1937, in denying debtor's petition to review and reverse the order of the Referee made on June 14, 1937.

- (b) That said order is contrary to law.
- (c) That said order is contrary to the evidence.

VI

(a) The District Court erred in making its order of February 17, 1938, and in confirming the Referee's assumption of jurisdiction to hold a creditor's meeting and appoint a trustee, after a petition for rehearing was seasonably presented and entertained by the District Court and allowed to be filed by a Judge of the said District Court, and notice of such filing given to the Referee prior to the holding of the said creditor's meeting and the appointment of the trustee.

- (b) That said order is contrary to law.
- (c) That said order is contrary to the evidence.

VII

The District Court erred in holding that the Referee had jurisdiction to hold a first meeting of creditors, appoint a trustee, etc. (a) in less than ten days, or (b) more than thirty days after the adjudication of October 15, 1937, in accordance with the provisions of Section 55 (a) of the Bankruptcy Act (11 U. S. C. A. 91).

VIII

The District Judge erred and abused his discretion in making his order on October 15, 1937, when he stated in open court from the bench that he was adjudicating the debtor a bankrupt because "there has to be an end to litigation some time and this case has dragged on long enough."

IX.

The District Judge erred and abused his discretion in making his order of October 15, 1937, when he refused to consider the entire record before him and stated in open court from the bench that he did not intend to wade through such a voluminous record and would consider only the certificate of the Referee prepared after review of the Referee's order of June 14, 1937.

X

The District Judge erred and abused his discretion by his refusal and failure to consider two affidavits which had been presented to, received and cause to be filed by him on October 15, 1937; at which time the said Judge stated in open court from the bench that while he was receiving them and allowing them to be filed, he did not intend to read them.

(Exhibit "A"—Affidavit of C. F. McKay)

(Exhibit "B"—Affidavit of Lamont)

William Bowman)

XI.

The District Judge erred and abused his discretion when he failed to vacate the order made by the Referee appointing a trustee and further failed to reverse the ruling of the Referee wherein said Referee refused to stay proceedings until such time as debtor's petition for rehearing had been determined.

XII.

The District Judge erred by sustaining the contention of Referee that said Referee had summary jurisdiction to determine and make a finding on a disputed set-off claimed by the debtor when the District Judge was fully advised that a plenary action had been filed, was pending between the debtor and said "secured" creditor (Loperenas'), and was actually contained in and as a part of this record.

XIII

The District Judge erred and abused his discretion in sustaining the contention of Referee and in confirming a *find* by the said Referee that the debtor was not entitled to an offset of \$1,000.00, and interest, against said objecting "secured" creditor (Loperenas') when there was no conflict in the evidence that debtor had paid objecting creditor said sum of \$1,000.00, and which sum had not been credited on account of the purchase price on the real property on which said objecting creditor (Loperenas') retained a purchase money lien.

XIV

The District Judge erred in sustaining the contention of the Referee that the Loperenas' were and should be considered objecting "secured" creditors and entitled by such assumed status to make objections, when the evidence is conclusive that if the said offset of \$1,000.00,

and interest, had been credited on the purchase money lien of objecting "secured" creditor (Loperenas'), the lien of said objecting "secured" creditor would not have been in default, and the Loperenas' could not then be considered creditors. (NOTE: The Loperenas' are the only objecting creditors.)

XV

The District Judge erred in holding that the Referee in Bankruptcy retained jurisdiction to make an order concerning the administration of the estate of debtor during the time after which the order of October 15, 1937, denying review, was made and until the time for appeal from said order had passed and the order of October 15, 1937, had become final.

XVI

The District Judge erred and abused his discretion in sustaining the contention of the Referee that debtor's supplemental extension proposal and/or proposals did not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and for the financial rehabilitation for the debtor himself.

XVII

The District Judge erred by sustaining the contention of the Referee, that material evidence had been properly excluded by the said Referee as follows:

- (a) The introduction of any evidence from the witness Martin Loperena relative to the payment to and receiving by the said Martin Loperena of the \$1,000.00 on which debtor claims an offset, said Referee actually stating at the time that "as far as this proceeding was concerned said testimony was wholly incompetent, irrelevant and immaterial."

(b) The introduction of any evidence from a clerk of the bank in which Martin Loperena had made a deposit of said \$1,000.00 claimed as an offset by the debtor herein, said Referee likewise ruling that said testimony was incompetent, irrelevant and immaterial.

XVIII

That the District Court erred in sustaining the contention of the Referee that the said Referee had jurisdiction to make a finding and an order when the Referee specifically had held that he had no jurisdiction to determine whether the \$1,000.00 set off claimed by the debtor should be credited against the "secured" creditor (Loperenas') in this proceeding, but notwithstanding his statement that he had no jurisdiction he ruled that the debtor was not entitled to such credit.

XIX.

That the District Court erred in confirming the Referee's finding that the debtor was not entitled to the \$1,000.00 set off when in truth and in fact the only testimony before the Referee was the uncontradicted testimony of the debtor to the effect that he had paid and Martin Loperena had received \$1,000.00, which had not been credited on account of the purchase price of the real property covered by the purchase money lien of the objecting "secured" creditor.

XX

That from the preponderance of the evidence it appears that the real property and improvements thereon, upon which the objecting creditor has a lien, has a present value in excess of \$20,000.00, and that the pharmacy and drug business, fixtures, stock of merchandise and good will of the business has a reasonable value of \$10,000.00; that it further appears from the preponderance of the evi-

dence that said debtor has had at all times a gross sales in excess of \$2,000.00 per month, and that said gross sales have been as high as \$3,500.00 per month; that the second story of said improvements contain furnished apartments and that the debtor is now, and has been, realizing from said apartments and pharmacy business sufficient assets to liquidate all of his outstanding indebtedness, dollar for dollar.

XXI

That the Referee and the District Court refused and failed to take into consideration the fact that the debtor had previously paid to the said objecting creditor solely from the income of said drug and pharmacy business the sum of more than \$30,000.00; that the evidence is uncontradicted that the income from the drug and pharmacy business of this debtor and rentals of the furnished apartments would be sufficient to pay the principal, interest, taxes, street bonds and other charges, and that debtor would be able to amortize the total principal of his obligations if given a reasonable and definite period in which to act.

WHEREFORE, appellant prays that the order, orders, decree, and decrees of the said District Court of the United States be reversed.

DATED: Los Angeles, California, this 18th day of March, 1938.

J. EARL HASKINS and
CHARLES PECKHAM
BY J. Earl Haskins
Attorneys for Appellant.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 19 min past 1 o'clock Mar. 18, 1938 A. M., By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CIVIL UNDERTAKING ON APPEAL.

WHEREAS, on the 15th day of October, 1937, and on the 17th day of February, 1938 judgments were rendered by the above court in the above entitled action in favor of the Appellees, and against appellant, therein, and

WHEREAS, the appellant desires to appeal from said judgments and has taken an appeal to the CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, to reverse the judgment and decree of the District Court of the United States, in and for the District of California, Southern Division:

NOW, THEREFORE, in consideration of the premises and of the taking of said appeal, the undersigned GLENS FALLS INDEMNITY COMPANY, a corporation duly organized and existing under the laws of the State of New York, and having complied with the regulations of the United States of America relative to the execution and filing of bonds, stipulations and undertakings in the Courts of the United States of America, does undertake, promise and acknowledge itself bound in the sum of TWO HUNDRED FIFTY and NO/100 (\$250.00) DOLLARS, lawful money of the United States of

America to the effect that said Appellant, shall prosecute their appeal to effect and answer all costs if they fail to make their plea, and shall pay all costs which may be assessed against them on the appeal or on a dismissal thereof.

IN WITNESS WHEREOF, the said GLENS FALLS INDEMNITY COMPANY has hereunto caused its name and corporate seal to be affixed by its duly authorized officers at Los Angeles, California, this 24th day of March, 1938.

[Seal]

GLENS FALLS INDEMNITY
COMPANY

By Dorothy Rutherford

Attorney.

STATE OF CALIFORNIA)
County of LOS ANGELES,)
ss.

On this 24th. day of March, in the year One Thousand Nine Hundred and thirty-eight before me; CEDRIC L. DREW, a Notary Public in and for said County of LOS ANGELES, residing therein, duly commissioned and sworn, personally appeared, DOROTHY RUTHERFORD, known to me to be the ATTORNEY of the GLENS FALLS INDEMNITY COMPANY, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of LOS ANGELES, the day and year in this certificate first above written.

[Seal]

Cedric L. Drew

Notary Public in and for the County of LOS
ANGELES, State of California.

My Commission expires April 30th, 1941.

I hereby approve the foregoing bond.

Dated the 25th day of March, 1938.

Paul J. McCormick

Judge.

[Endorsed]: Filed. R. S. Zimmerman, Clerk, at 31
min. past 11 o'clock Mar. 25 1938 A. M. By M. J.
Sommer Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

LAMONT WILLIAM BOWMAN'S request for a continuance for time in which to file transcript (record) on appeal, came on regularly to be heard Friday the 13th day of May, 1938, before the Honorable Paul J. McCormick, Judge of the United States District Court; Lamont William Bowman being represented by his attorneys, J. Earl Haskins and Charles Peckham, and the secured creditors, Loperenas' being represented by their attorneys, Noon and Noon, and evidence both oral and documentary being heard and considered and good cause appearing threfor:

IT IS HEREBY ORDERED that Lamont William Bowman may have to and including the 1st day of June, 1938, in which to file his transcript. (record) on appeal.

DATED at Los Angeles, California, this 13th day of May, 1938.

Paul J. McCormick
Judge of the United States District Court.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

Upon consideration of the affidavit and request of J. Earl Haskins, one of the attorneys for the Appellant herein, for leave to serve citation and other papers upon appellees, and good cause appearing therefor,

IT IS ORDERED, that the service of citation, order allowing appeal, assignments of error, praecipe for transcript or record, statement of evidence, notice of lodgment of statement of evidence and appellant's brief may be made by mail upon the appellees, Loperenas', by service upon Noon and Noon, First National Bank Building, San Diego, California, attorneys of record for Loperenas', appellees, and that such service shall be deemed sufficient.

DATED: May 27th, 1938.

Paul J. McCormick
United States District Judge.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 14-min. past 2 o'clock May 27, 1938 P. M., By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

For good cause shown and it appearing that the appellant has this date filed with the Clerk of the District Court a Notice of Lodgment of Statement of Evidence, Statement of Evidence and Praeclipe,

IT IS HEREBY ORDERED that the time within which appellant herein must file his record and docket the case with the Clerk of the Circuit Court of Appeals, be and the same hereby is enlarged to and including the 28 day of June 1938.

IT IS FURTHER ORDERED that the return date of the Citation heretofore issued by the United States District Court herein, be and the same is hereby extended to and including the 28 day of June, 1938.

IT IS FURTHER ORDERED that this Order be made a part of the record on appeal herein.

DATED: May 28, 1938.

Paul J. McCormick
United States District Judge.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

For good cause shown and it appearing that the appellant has this date filed with the Clerk of the District Court a Notice of Lodgment of Statements of Evidence, Statement of Evidence and Praecipe,

IT IS HEREBY ORDERED that the time within which appellant herein must file his record and docket the case with the Clerk of the Circuit Court of Appeals, be and the same hereby is enlarged to and including the 18th day of July 1938.

IT IS FURTHER ORDERED that the return date of the Citation heretofore issued by the United States District Court herein, be and the same is hereby extended to and including the 18th day of July, 1938.

IT IS FURTHER ORDERED that this Order be made a part of the record on appeal herein.

DATED: June 24, 1938.

Paul J. McCormick
United States District Judge.

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER

For good cause shown and it appearing that the appellant has this date filed with the Clerk of the District Court a Notice of Lodgment of Statements of Evidence, Statement of Evidence and Praeclipe,

IT IS HEREBY ORDERED that the time within which appellant herein must file his record and docket the case with the Clerk of the Circuit Court of Appeals, be and the same hereby is enlarged to and including the 1st day of August, 1938.

IT IS FURTHER ORDERED that the return date of the Citation heretofore issued by the United States District Court herein, be and the same is hereby extended to and including the 1st day of August, 1938.

IT IS FURTHER ORDERED that this Order be made a part of the record on appeal herein and that the foregoing order and extension is final.

DATED: July 14, 1938.

Paul J. McCormick
United States District Judge.

[TITLE OF DISTRICT COURT AND CAUSE.]

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)

) ss.

County of Los Angeles)

Jessie McDonald, being first duly sworn, deposes and says: That she is a citizen of the United States and a resident of the County of Los Angeles, State of California; that she is over the age of 18 years and not a party to the within action; that her business address is 710 Title Insurance Building, Los Angeles, California.

That on the 27th day of May, 1938, she served a Notice of Lodgment of Statement of Evidence, Statement of Evidence, Order and Praecept, upon the appellees herein, by placing a true copy thereof in an envelope addressed as follows: Messrs. Noon and Noon, Attorneys, First National Bank Building, San Diego, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office of Los Angeles, California, where is located the office of the attorneys of the appellant by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

Jessie McDonald

Subscribed and sworn to this 27 day of May, 1938.

[Seal]

J Earl Haskins

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 51 min. past 11 o'clock May 28, 1938 A. M., By M. J. Sommer, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue:

1. Referee's judgment docket of claimants.
2. Order fixing date of first meeting of creditors.
3. Notice of first meeting of creditors under date of June 22, 1935, with affidavit of publication.
- 3a. Order of District Judge certifying documents referred to in Nos. 1, 2 and 3. of this Praecipe, and Certificate of Referee.
4. Order entered May 15, 1936, by Hon. Leon R. Yankwich, District Judge, re-referring the matter to the Referee for further proceedings.
5. Supplemental proposal for extension under date of August 8, 1936, bearing District Court filing stamp, September 24, 1935.
6. Minute Order entered Friday, August 21, 1936, from Department of Albert Lee Stephens, United States District Judge.
7. Adjudication and Order of Reference under Sec. 74; entered August 21, 1936.
8. Certificate of Referee of debtor's Petition for Extension, dated August 19, 1936, and filed in the District Court August 21, 1936.

9. Petition for debtor for Review of Referee's Order dated August 27, 1936.
10. Statement of Referee on Petition on debtor for review filed September 24, 1936.
11. Petition for re-hearing filed September 10, 1936.
12. Notice of Motion for Order to set aside and vacate Order adjudicating debtor a bankrupt.
13. Order of Honorable Paul J. McCormick made and entered, October 16, 1936.
14. Supplemental proposal for extension of time to pay debtor's obligations under date of December, 1936.
15. Order continuing hearing of supplemental Petition for extension dated December 16, 1936, by Stanley T. Howe, Referee.
16. Order continuing hearing petition for extension dated March 15, 1937.
17. Orders denying Petition for Extension and of confirmation of proposal thereof by Stanley T. Howe, Referee, dated June 14, 1937.
18. Petition of debtor for review of recommendation and/or Order of Referee without exhibits under date of July 14, 1937, and filed July 15, 1937.
19. Certificate of Referee.
20. Affidavit of Charles F. McKay filed in the District Court October 15, 1937.
21. Order confirming Referee's finding on review filed October 25, 1937.

22. That part of the decision filed February 17, 1938, by the Honorable Jeremiah Neterer, District Judge, as follows: "The motion for Re-hearing is denied."
23. Petition for Appeal to the Circuit Court of Appeals, Ninth Circuit and Assignment of Errors.
24. Order allowing the appeal.
25. Citation on appeal.
26. Bond on appeal.
27. Services of the copy of citation for appeal in assignment of errors; acknowledgment of service made by Noon and Noon, attorneys for Appellees dated March 31, 1938.
28. Order extending time in which to file transcript, record, made by H. A. Holser, United States District Judge and filed April 14, 1938.
29. Order extending time in which to file transcript (record on Appeal) made by Honorable Paul J. McCormick, United States District Judge, and filed May 13, 1938.
30. Order of which is dated May, 1937, extending return date of Citation.
31. Notice of Lodgment of Statement of the Evidence.
- 31a Statement of the procedure facts and evidence.
32. Affidavit of service of this Praeclipe and Notice of Lodgment of Statement of Evidence.

33. This Praecept.
34. Order permitting service by mail.
35. Affidavit of service by mail.

Please omit headings on all papers, except on the first paper filed in each Court, and insert in lieu theréof "Court and Cause."

Dated May 27th, 1938

J. EARL HASKINS AND
CHARLES PECKHAM

By J Earl Haskins

Attorneys for Appellant.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 9 min.
past 2 o'clock May 27, 1938 P. M., By F. Betz, Deputy
Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF SAID COURT:

SIR:

Please include among the records requested by the attorneys for the appellants herein for purposes of appeal the entire decision and opinion rendered herein by the Hon. Jeremiah Neterer United States District Judge, and filed February 17, 1938.

Dated: June 8, 1938.

NOON & NOON

By Fred Noon

Attorneys for Objecting Creditors, Martin Loperena,
Gregorio Loperena, Martin J. Loperena and
Phyllis Bouton

[Endorsed]: Received copy of the within Praeclipe this
June 9, 1938. J. Earl Haskins. Filed R. S. Zimmerman,
Clerk, at 9 min. past 3 o'clock June 9, 1938 P. M., By
M. J. Sommer, Deputy Clerk.

The above application for inclusion in appeal record is
granted and it is so ordered.

Dated July 14 - 1938

Paul J. McCormick

Judge

[Endorsed]: Filed Jul. 14, 1938 at 10:20 A. M. R.
S. Zimmerman, Clerk, By B. B. Hansen, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE]

ORDER AMENDING PRAECIPE

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Praecipe may be enlarged to include in the Record of the Transcript on appeal, the following documents:

- (a) Petition of petitioning debtor for re-hearing, including the authority to file said petition executed November 15, 1937, by the Hon. Ralph E. Jenny;
- (b) Affidavit of J. Earl Haskins in support of petition;
- (c) Affidavit of Lamont William Bowman in support of said petition;
- (d) Copy of Complaint in action B-17-E in the District Court of the United States in and for the Southern District of California, Southern Division, entitled: Lamont William Bowman, plaintiff, versus Martin Loperena, et al, defendants.

DATED: This 14th day of July, 1938,

At San Diego, California.

Paul J. McCormick
Judge of the District Court.

Print 60 copies E.L.S.

[Endorsed]: Filed Jul. 14, 1938 at 10:30 A. M. R.
S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 171 pages, numbered from 1 to 171 inclusive, to be the transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; referee's judgment docket of claimants; order fixing time for first meeting of creditors; notice of first meeting of creditors in proceedings under Section 74 and affidavit of publication; order of May 27, 1938; order of May 15, 1936; supplemental proposal for extension; order of August 21, 1936; adjudication; certificate of referee on debtor's petition for extension; statement of referee on petition of debtor for review; petition of debtor for review of referee's order; petition for rehearing; notice of motion for order to set aside and vacate order adjudicating debtor a bankrupt and to dismiss the proceedings without prejudice; order of October 16, 1936; supplemental proposal for extension of time to pay debtor's obligations under date of December 11, 1936; order continuing hearing on supplemental petition for extension; order continuing hearing petition for extension; order denying petition for extension and of confirmation

of proposal thereof; petition of debtor for review of recommendation and/or order of referee; certificate of referee on petition for review; order confirming referee's findings on review; petition of petitioning debtor for rehearing and order granting same; affidavit of J. Earl Haskins; affidavit of C. F. McKay setting forth additional facts and evidence not included in the certificate of the referee; affidavit of Lamont William Bowman; decision and opinion; certificate of special master upon settlement of statement of evidence; notice of lodgment of statement of evidence; engrossed statement of evidence; petition for appeal and order allowing appeal; assignment of errors; undertaking on appeal; orders extending time; affidavit of service; praecipe and order amending praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is \$26.90 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$232.90 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 29th day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of

our Independence the One Hundred and Sixty-third.

[Seal]

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By EDMUND L. SMITH,

Deputy.

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NO. 8796

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAMONT WILLIAM BOWMAN,

Appellant,

vs.

MARTIN LOPERENA, GREGÓRIA LOPERENA, MARTÍN J. LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO LOPERENA and SEBASTIANA LOPERENA,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California,
Southern Division

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, March
22, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered oral motion of appellees to dismiss appeal and cause on merits argued by Mr. J. Earl Haskins, counsel for appellant, and by Mr. Fred A. Steiner, counsel for appellees, and submitted to the court for consideration and decision:

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 2,
1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING DECREE**

By direction of the Court, ordered that the type-written opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that

a decree be forthwith filed in the case and entered in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California,
Southern Division

OPINION

Before: Denman, Mathews and Healy,
Circuit Judges.

Denman, Circuit Judge:

Appellant, debtor in a proceeding under §74 of the National Bankruptcy Act as amended in 1934 (11 USCA §202), filed his petition for an appeal from certain orders in that proceeding on March 18, 1938, and the district judge granted the petition and allowed the appeal on the same day.

The petition states the orders sought to be appealed from are:

"* * * that certain order rendered October 15, 1937 (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supplementary petitions for relief under Section 74 of the Bankruptcy Act, does

hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a \$1,000.00 credit on a note secured by a purchase money trust deed in favor of the 'secured' creditors (Loperenas'), * * *."

The order of February 17, 1938, denying the petition for rehearing of an order of October 15, 1937, is not appealable. Wayne Gas Co. v. Owens Co., 300 U. S. 131, 137.

An examination of the record shows that all the other orders from which the appeal was granted were made many months before the petition for appeal was filed and the allowance made by the district judge, the nearest to the filing having been made nearly four months prior to the judge's allowance. Hence he had no jurisdiction to allow the appeal.

Appeal dismissed.

[Endorsed]: Opinion. Filed May 2, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8796

LAMONT WILLIAM BOWMAN,

Appellant,

vs.

MARTIN LOPERENA et al.,

Appellees.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, and on motion to dismiss appeal, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged, and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered May 2, 1939.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, June 10,
1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

**ORDER GRANTING PETITION
FOR REHEARING**

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed May 31, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is granted.

It is further ordered that appellees are allowed to file a brief, within 20 days, on the question of the effect of a petition for a rehearing on an issue decided by an appealable order in bankruptcy, as extending the term for the beginning of the time within which an appeal from the order may be taken. Appellant to have 20 days to reply, if so advised. The appeal is to be deemed submitted on the argument heretofore made and upon filing of such brief or briefs.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, March
14, 1940.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
ON PETITION FOR REHEARING, ETC.**

By direction of the Court, ordered that the type-written opinion this day rendered by this Court on petition of appellant for rehearing be forthwith filed by the clerk.

Pursuant thereto, it is ordered that the opinion of this court heretofore rendered and filed on August 28, 1939 be, and hereby is withdrawn, and that the decree of this court heretofore rendered and filed on August 28, 1939 be, and hereby is vacated and set aside; and that a decree be filed and entered in the minutes of this court in accordance with the opinion rendered.

It is further ordered that the petition of appellant, filed September 28, 1939, and within time allowed therefor by order of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division On Petition for Rehearing.

OPINION ON PETITION FOR REHEARING

Before: Denman, Mathews and Healy,
Circuit Judges.

Denman, Circuit Judge:

Appellant, debtor in a proceeding instituted by him May 23, 1935, under Section 74 of the Bankruptcy Act as amended in 1934,¹ filed in the district court on March 18, 1938, his petition for an appeal from certain orders in that proceeding and the district court granted the petition and allowed the appeal on the same day.

The district court adjudicated the appellant a bankrupt by an order of date August 21, 1936, and appellant purports to appeal from this order under Section 25(a) of the Bankruptcy Act as amended in 1934 as a judgment adjudging him a bankrupt.²

¹11 U. S. C. (1934) §202.

²* * * (a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the United States Court of Appeals for the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a

Appellant's time to appeal under Section 25(a) expired thirty days after this judgment adjudging the debtor a bankrupt was rendered, unless the running of the time for taking appeal was suspended by a petition for rehearing. See Morse v. United States, 270 U. S. 151, 153, 154, citing cases. Appellant filed a petition for rehearing on September 10, 1936, but it appears to be directed to certain action of the Referee rather than to the order of adjudication. However, even if we assume there was a valid petition for rehearing which suspended the running of the time for taking an appeal, the time began to run when the district court, on October 25, 1937, denied the petition for rehearing and a motion to vacate which had been made in October, 1936, by ordering the Referee "to proceed under the said order of reference and adjudication."

The order entered October 25, 1937, also confirmed an order of the Referee of June 14, 1937, denying the debtor's petition for extension and for confirmation of the proposals therefor. On November 15, 1937, there was filed by the appellant a petition for rehearing with respect to the order of the district court entered October 25, 1937, insofar as it confirmed the order of the Referee, but the petition does not appear to be and the appellant concedes

debt or claim of \$500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

that it was not also a petition for rehearing with respect to the order of adjudication of August 21, 1936:

The time for appeal from the order of adjudication began to run upon the denial of the first mentioned petition for rehearing by the order entered October 25, 1937, and it had expired long before the filing of the petition for an appeal on March 18, 1938.

The appellant also treats the order of the district court of October 25, 1937, confirming the order of the Referee of June 14, 1937, as being appealable under Section 25(a) by the petition to the district court for allowance,³ as a judgment rejecting a claim in excess of \$500.00.⁴ With this we do not agree. Appellant appears so to regard the order of the district court because the Referee in connection with his order denying confirmation and his declaration that the plan for extension proposed by the debtor "does not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself," made a finding, inter alia, that appellant had not as he contended made a \$1,000 payment to one of the appellee secured creditors for which he had not received credit, and the district court approved the findings of the

³There is no appeal allowed under Section 24(b) by this circuit court of appeals.

⁴11 U. S. C. (1934) §48(a) set forth in footnote 2, supra.

Referee. However, the only order made by the Referee on June 14, 1937, was one denying the petition of the debtor for an extension and for confirmation of his proposals therefor, and the order of the district court confirming this order of the Referee was not a judgment rejecting a claim within the meaning of Section 25(a). Assuming that the order of the Referee and the order of the district court confirming the Referee's order were in anywise predicated upon the finding with respect to the \$1,000 payment, the validity of these orders and of the finding are matters not properly before us. The order of the district court confirming the order of the Referee denying the petition for extension and for confirmation was not within any of the classes of judgments from which an appeal could be taken under Section 25(a) of the Bankruptcy Act as amended in 1934,⁵ and since it was not in a "[controversy] arising in bankruptcy proceedings" it was not appealable under Section 24(a) of the Act.⁶

⁵11 U. S. C. (1934) §48(a), set forth in footnote 2, supra.

*** * * (a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the United States Court of Appeals for the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers, and during their respective terms, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

11 U. S. C. (1934) §47(a).

The appeal also purports to be taken from an order of February 17, 1938, denying a petition for rehearing, but such an order is not appealable. See Wayne Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137, citing cases in footnote 10.

The petition for rehearing filed September 28, 1939, is denied. The opinion of this court filed August 28, 1939, is withdrawn. The decree of this court filed and entered on August 28, 1939, is vacated and set aside. It is ordered that a decree be entered dismissing the appeal.

Appeal dismissed.

[Endorsed]: Opinion On Petition for Rehearing. Filed Mar. 14, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8796

LAMONT WILLIAM BOWMAN,

Appellant,

vs.

MARTIN LOPERENA, et al.,

Appellees.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged, and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Mar. 14, 1940.
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. J. Earl Haskins counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including May first, 1940; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the

mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN

United States Circuit Judge

Dated: Los Angeles, California, April 16, 1940.

[Endorsed]: Filed Apr. 16, 1940. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred ninety-one (191) pages, numbered from and including 1 to and including 191, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of April, 1940.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

IN THE

Supreme Court of the United States

Office - Supreme Court, U. S.
FILED

APR 29 1940

1940 TERM
FEDERAL BUREAU OF INVESTIGATION
NEW YORK

TERM, 1940.

No. 953 59

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J. LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO LOPERENA and SEBASTIANA LOPERENA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit, and Brief in Support Thereof.

L. A. LUCE,

937 Munsey Building, Washington, D. C.,
Counsel for Petitioner.

J. EARL HASKINS,
As of Counsel.

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1 Collier on Bankruptcy (13th Ed.), p. 42	49
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IN THE
Supreme Court of the United States

, TERM, 1940.

No.

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J.
LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO
LOPERENA and SEBASTIANA LOPERENA.

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals, Ninth Circuit.**

Your Petitioner Respectfully Shows:

I.

(1) Lamont William Bowman, on May 23, 1935, filed his petition in the District Court of the Southern District of California, Southern Division, for relief under Section 74 of the Bankruptcy Act as amended in 1934 (11 U. S. C. (1934), Sec. 202), praying for an extension of time within which to meet his obligations, and specifically waived composition. Said matter was thereafter referred to the Referee.

(2) August 19, 1936, the referee hearing said matter, *without making any order*, denying or granting debtor's extension proposal and acting as a Special Master without

any authority or order of Court for so doing, filed his recommendation with the District Court that the debtor, Bowman, be adjudicated a bankrupt. (App. Op. Br. p. 10.) [Tr. p. 141.]

(3) August 21, 1936, one of the District judges acting on the foregoing recommendation of the referee made his order of adjudication and reference under Section 74 of the said Bankruptcy Act and, on the same day, the Adjudication and order of Reference was filed with the clerk of said court. [Tr. p. 18.]

(4) August 27, 1936, Bowman, as debtor, filed a Petition for Review of Referee's Order.

(5) September 10, 1936, Bowman, debtor, filed a Petition for Rehearing with the clerk of the District Court at Los Angeles, California, praying that the Order of Adjudication be vacated and set aside.

(6) October 14, 1936, Bowman filed a Notice of Motion for Order to Set Aside and Vacate the Order of Adjudication.

(7) October 16, 1936, one of the District judges made and had entered his order specifically referring to the objection filed by the Loperenas to the "bankrupt's Petition for Rehearing," as follows:

"It is Now Ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this Court entered May 15th, 1936, be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an Order or orders thereon pursuant to provisions of the National Bankruptcy Act

and all amendments thereto and the General Orders in Bankruptcy, and it is further ordered that all proceedings herein, other than those heretofore ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21, 1936, be stayed until the further order of this Court made by a Judge thereof."

[Tr. pp. 37-38.] (The italics are ours.)

(8) October 25th, 1937, one of the District judges denied a review of a referee's order made June 14th, 1937, and confirmed the findings of the referee denying ~~the~~ ^{the} debtor's extension proposal. There was an addenda to the order, as follows:

"It Is Further Ordered that the stay of proceedings under the Order of Adjudication and Reference heretofore entered in this matter on August 21, 1936, be and the same is hereby vacated, set aside and quashed, and the Referee is directed to proceed under said Order of Reference and Adjudication to take and perform any and all such acts, and to do such things as are required, directed and authorized under said Order of Adjudication and Reference."

"Done in Open Court, this 25 day of October, 1937.

JEREMIAH NETERER

• *Judge of the U. S. District Court*

• (Filed R. S. Zimmerman, Clerk, at 47 min. past 11 o'clock Oct. 25, 1937, A.M. by M. R. Winchell, Deputy Clerk)." [Tr. pp. 87 and 88.]

(9) November 15, 1937, debtor Bowman prepared and filed his "Petition of Petitioning Debtor for Rehearing" [Tr. pp. 89-97], specifically requesting "that the adjudication of bankruptcy should be set aside and the matter be remanded to the Referee with orders to (1) reconsider the petitioning debtor's Proposal for Extension and (2) to withhold any proceedings in the bankruptcy matter until such time as it can be ascertained whether or not said trust deed was actually in default at the date that the declaration of default was made on or about the month of January, 1935." [Tr. p. 96.]

(10) November 15, 1937, the following order was affixed to the Petition of Petitioning Debtor for Rehearing prior to filing:

"This Petition having been "seasonably presented" and "entertained" by the above entitled court, permission to file same is hereby granted.

Dated: This 15th day of November, 1937.

RALPH E. JENNEY
Judge of the District Court

(Endorsed: Filed R. S. Zimmerman, Clerk, at 27 min. past 4 o'clock, November 15, 1937, P.M. By M. R. Winchell, Deputy Clerk.)"

(11) February 17, 1938, after a hearing had thereon, Honorable Jeremiah Neterer, District Judge, rendered his decision denying debtor's Petition for Rehearing. [Tr. P. 119.] (Endorsed: Filed Feb. 17, 1938, R. S. Zimmerman, Clerk, by R. B. Clifton, Deputy.)

(12) March 18th, 1938, Petition for Appeal to Circuit Court of Appeals, Ninth Circuit, was allowed and filed. [Tr. pp. 147-148.] [Tr. p. 150.] (Endorsed: Filed R. S. Zimmerman, Clerk, at 19 min. past 1 o'clock, Mar. 18, 1938, A.M., by M. J. Sommer, Deputy Clerk.)

(13) May 2, 1939, the Honorable Circuit Court rendered its decision as follows:

"Court and Cause—No. 8796

May 2, 1939

"Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding under sec. 74 of the National Bankruptcy Act as amended in 1934 (11 USCA sec. 202), filed his petition for an appeal from certain orders in that proceeding on March 18, 1933, and the district judge granted the petition and allowed the appeal on the same day.

"The petition states the orders sought to be appealed from are: * * * that certain order rendered October 15, 1937, (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supple-

mentary petitions for relief under Section 74 of the Bankruptcy Act, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a \$1,000.00 credit on a note secured by a purchase money trust deed in favor of the "secured creditors" (Loperenas). * * *

"The order of February 17, 1938, denying the petition for rehearing of an order of October 15, 1937, is not appealable. Wayne Gas Co. v. Owens, 300 U. S. 131, 137.

"An examination of the record shows that all the other orders from which the appeal was granted were made many months before the petition for appeal was filed and the allowance made by the district judge, the nearest to the filing having been made nearly four months prior to the judge's allowance. Hence he had no jurisdiction to allow the appeal.

"Appeal dismissed.

(Endorsed: Opinion. Filed May 2, 1939. Paul P. O'Brien, Clerk.)

(14) May 29, 1939, a petition for rehearing from the decision entered May 2, 1939, was filed by Bowman, and, on June 10, 1939, the Circuit Court granted the petition for rehearing; the Loperenas filed their brief on rehearing June 30, 1939, and Bowman filed his reply brief July 19, 1939.

(15) August 28, 1939, the Circuit Court rendered its decision on the Petition for Rehearing, as follows:

"Court and Cause: No. 8796

Aug. 28, 1939.

Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

On Rehearing.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding under Sec. 74 of the National Bankruptcy Act as amended in 1934 (11 USCA Sec 202), filed his petition for an appeal from certain orders in that proceeding on March 18, 1938, and the district judge granted the petition and allowed the appeal on the same day.

"The petition for appeal stated that it was from * * * that certain order rendered October 15, 1937 (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supplementary petitions for relief under Section 74 of the Bankruptcy Act, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a \$1,000.00 credit on a note secured by a purchase money trust deed in favor of the "secured creditors" (Loperenas) * * *

"The district court adjudicated the appellant a bankrupt by an order of date August 21, 1936. The statutory period for appeal was extended by a petition to vacate the order and for a rehearing filed on September 10, 1936. Morse v. U. S., 270 U. S. 151, 153, 154; Mitchell v. Maurer, (CCA-9), 67 F. (2d) 286, 287.

"After a subsequent hearing, an order was made on October 16, 1936, referring to but not deciding the petition of September 10, 1936, and ordering a stay of proceedings under the adjudication. The litigation continued with no decision on the petition for rehearing until October 25, 1937, when it was disposed of by an order of Judge Neterer directing the referee "to proceed under the said order of reference and adjudication."

"On November 15, 1937, there was filed a petition to rehear the order of October 25, 1937, denying the petition to rehear the order of adjudication. This petition to rehear the order denying the first petition to rehear was denied on February 17, 1938. *In our opinion the first petition to rehear extended the time to appeal to its denial on October 25, 1937.* The time to appeal then began to run and it had expired long before the filing of the petition for an appeal on March 18, 1938, and the order allowing it on the same day.

"There is no merit in the contention that a petition to rehear an order denying a petition to set aside a previous order of adjudication and rehear the petition for adjudication in bankruptcy again extends the time for appeal from the adjudication.

"The order denying a petition to set aside an order and rehear the petition for adjudication in bankruptcy

is not appealable. Wayne Gas Co. v. Owens, 300 U.S. 131, 137. The district court has lost its jurisdiction to allow the appeal from the order of adjudication before it made its order of March 18, 1938, purporting to allow such appeal.

"The order of October 25, 1937, also confirmed the referee's findings, among others, that bankrupt had not paid a certain \$1,000 on the creditors' claim of the Loperena appellees and disallowed the debtor's claim of a credit to that amount. The petition of November 15, 1937, for setting aside this order of the court extended the time of appeal until its denial on February 17, 1938, and the appeal from this order was duly taken.

"On the merits of the disallowance of the \$1,000.00 credit, the evidence of the debtor is not uncontradicted as claimed by him. On the contrary it is contradicted by the debtor himself, who stated in his schedules that he owed the sum claimed by the Loperenas. The referee could well have believed the debtor was not telling the truth on the stand and that he did tell the truth when he filed his schedules.

"The appeal from the order adjudicating the bankruptcy is dismissed and the order denying petitioner's claim to the \$1,000 credit on the Loperena note is affirmed. (The italics are ours.)

"(Endorsed:) Opinion on rehearing. Filed Aug. 28, 1939. Paul P. O'Brien, Clerk."

(16) September 27, 1939, a Petition for Rehearing from Decision entered August 28, 1939, was filed.

(17) March 14, 1940, the Circuit Court rendered its decision as follows:

"Court and cause. No. 8796

Mar. 14, 1940

"Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division, On Petition for Rehearing.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding instituted by him May 23, 1935, under Section 74 of the Bankruptcy Act, as amended in 1934, filed in the district court on March 18, 1938, his petition for an appeal from certain orders in that proceeding and the district court granted the petition and allowed the appeal on the same day.

"The district court adjudicated the appellant a bankrupt by an order of date August 21, 1936, and appellant purports to appeal from this order under Section 25 (a) of the Bankruptcy Act as amended in 1934 as a judgment adjudging him a bankrupt. Appellant's time to appeal under Section 25 (a) expired thirty days after this judgment adjudging the debtor a bankrupt was rendered; unless the running of the time for taking appeal was suspended by a petition for rehearing. See Morse v. United States, 270 U. S. 151, 153, 154, citing cases. Appellant filed a petition for rehearing on September 10, 1936, but it appears to be directed to certain action of the referee rather than to the order of adjudication. However,

even if we assume there was a valid petition for rehearing which suspended the running of the time for taking an appeal, the time began to run when the district court, on October 25, 1937, denied the petition for rehearing and a motion to vacate which had been made in October, 1936, by ordering the Referee "to proceed under the said order of reference and adjudication."

(The order entered October 25, 1937, also confirmed an order of the Referee of June 14, 1937, denying the debtor's petition for extension and for confirmation of the proposals therefor. On November 15, 1937, there was filed by the appellant a petition for rehearing with respect to the order of the District court entered October 25, 1937, in so far as it confirmed the order of the Referee, but the petition does not appear to be and the appellant concedes that it was not also a petition for rehearing with respect to the order of adjudication of August 21, 1936.

"The time for appeal from the order of adjudication began to run upon the denial of the first mentioned petition for rehearing by the order entered October 25, 1937, and it had expired long before the filing of the petition for an appeal on March 18, 1938.

"The appellant also treats the order of the district court of October 25, 1937, confirming the order of the Referee of June 14, 1937, as being appealable under section 25(a) by the petition to the district court for allowance, as a judgment rejecting a claim in excess of \$500.00. With this we do not agree. Appellant appears so to regard the order of the district

court because the Referee in connection with his order denying confirmation and his declaration that the plan for extension proposed by the debtor 'does not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself,' made a finding, *inter alia*, that appellant had not as he contended made a \$1,000 payment to one of the appellee secured creditors for which he had not received credit, and the district court approved the findings of the Referee. However, the only order made by the Referee on June 14, 1937, was one denying the petition of the debtor for an extension and for confirmation of his proposals therefor, and the order of the district court confirming this order of the Referee was not a judgment rejecting a claim within the meaning of Section 25(a). Assuming that the order of the Referee and the order of the district court confirming the Referee's order were in anywise predicated upon the finding with respect to the \$1,000 payment, the validity of these orders and of the finding are matters not properly before us. The order of the district court confirming the order of the Referee denying the petition for extension and for confirmation was not within any of the classes of judgments from which an appeal could be taken under section 25 (a) of the Bankruptcy Act as amended in 1934, and since it was not in a (controversy) arising in bankruptcy proceedings it was not appealable under Section 24 (a) of the Act.

"The appeal also purports to be taken from an order of February 17, 1938, denying a petition for re-

hearing, but such an order is not appealable. See Wayne Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137, citing cases in footnote 10.

"The petition for rehearing filed September 28, 1939, is denied. The opinion of this court filed August 28, 1939, is withdrawn. The decree of this court filed and entered on August 28, 1939, is vacated and set aside. It is ordered that a decree be entered dismissing the appeal.

"Appeal dismissed.

"(Endorsed:) Opinion On Petition for Rehearing.
Filed Mar. 14, 1940. Paul P. O'Brien, Clerk."

(18) March 19, 1940, an Order Staying Mandate of the Circuit Court of Appeals was made by Honorable William Denman, U. S. Circuit Judge, and filed the same date, staying said mandate to and including April 20, 1940, in the event a Petition for Writ of Certiorari is filed in said case in the Supreme Court of the United States within said time.

(19) April 16th, 1940, an extension of time to file the foregoing Writ of Certiorari with the United States Supreme Court was duly granted by the Honorable William Denman, U. S. Circuit Judge, effective to and including May 1, 1940.

(20) On the day of , 1940, a petition for Writ of Certiorari was filed in accordance with the provisions of the order staying mandate and extension of time thereon.

Questions Involved.

The ultimate decision of the Circuit Court, rendered March 14, 1940, was an order that a decree be entered dismissing the appeal and the appeal was thereupon dismissed; it being held by the Court that the judgment or order entered Oct. 25, 1937, started the running of the time for the filing of the appeal and that a subsequent petition for rehearing "seasonably presented" and "entertained" by an order of one of the District judges did not have the effect of extending the time to "thirty days" after the decision had been rendered on the last named petition for rehearing, to-wit, February 17, 1938; but that the final date for filing the appeal was thirty days after October 25, 1937, and not thirty days after February 17, 1938; hence the allowance and filing of the appeal on March 18, 1938, was too late and the Court did not have jurisdiction to consider same.

Question No. 1: Was the appeal filed within the time allowed by Section 25 (a), Subdivision 1, of the Bankruptcy Act as amended in 1934, 11 U. S. C. (1934), Sec. 202, said section reading as follows: "appeals * * * may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States * * * (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt * * * such appeal shall be taken within thirty days after the judgment appealed from has been rendered * * *, and till the petitions for rehearings hereinbefore referred to, and orders thereon, suspend the time within which to have allowed and filed an appeal from the order of adjudic-

cation and reference made August 21, 1936, to a time on or before "thirty days" after Oct. 25, 1937, or to a time on or before "thirty days" after Feb. 17, 1938?

Question No. 2: The appeal having been filed in time, we are then concerned with the following question "on the merits."

Is it possible to install validity or breathe life into the original void adjudication and order of reference by a subsequent order made Oct. 25, 1937 and affirmed on rehearing on February 17, 1938? Said order directed the Referee to proceed "under said order of reference and adjudication to take and perform any and all such acts and to do such things as are required, directed and authorized under said adjudication and order of reference." The adjudication and order of reference dated August 21, 1936, was beyond the power and jurisdiction of the District judge to make under the only provisions of the Bankruptcy Act under which such adjudication and order of reference could have been made, to wit, Title 11, U. S. C. A., Sec. 202, Subdivision "L" thereof (Sec. 74 of the Bankruptcy Act, as amended June 7, 1934), and the General Orders in Bankruptcy as amended April 17, 1933, paragraph XII thereof.

Jurisdiction.

Petitioner contends that the Petition for Rehearing was filed with the clerk of the District Court at Los Angeles, California (and not with the clerk of the Referee in Bankruptcy at San Diego), on September 10, 1936, from the Adjudication and Order of Reference entered Aug. 21, 1936, and it suspended the time for the allowance and filing of the appeal until a final order had been made and entered covering the above named Petition for Rehearing. The order made Oct. 16, 1936, by one of the judges of the District Court was an interlocutory order staying proceedings under the Adjudication and Order of Reference. The order made Oct. 25, 1937, was primarily based on the Petition for Review of the order of the Referee of June 14, 1937, concerning an entirely different subject matter, but there was affixed to the order of Oct. 25, 1937, a clause specifically vacating and setting aside that part of the order theretofore made on Oct. 16, 1936, wherein "proceedings * * * be stayed until further order of this court made by a judge thereof."

Bowman filed his petition to rehear the order made Oct. 25, 1937, within the statutory period, to wit, on November 15, 1937. Before filing this Petition for Rehearing, however, it was presented to one of the District judges who endorsed thereon that the petition was "seasonably presented" and "entertained" thereafter, on the same day, it was filed with the clerk of the District Court at Los Angeles, California.

February 17, 1938, the last named Petition for Rehearing was denied and an order entered thereon.

Thereafter, within the statutory period of "thirty days", to wit, on March 18, 1938, Bowman presented his petition for appeal to one of the District judges, who granted and allowed the same, and said "allowed" appeal was filed on the same day, i. e., March 18, 1938.

IT IS THE FURTHER CONTENTION OF BOWMAN THAT:

FIRST: Timely motion for leave to file the second petition on November 15, 1937, was made and it is obvious from the endorsement on said petition by one of the District judges that the same was "seasonably presented" and "entertained"—thus the time for perfecting an appeal did not begin to run until the day that the Court actually denied such Petition for Rehearing, to wit, on Feb. 17, 1938.

SECOND: In any event, the judgment made pursuant to the original Petition for Rehearing of September 10, 1936, did not become a final judgment until the second Petition for Rehearing was denied, on February 17, 1938; hence, the final day for filing the appeal was not "thirty days" after October 25, 1937, but was "thirty days" after February 17, 1938, and since the appeal was allowed and filed March 18, 1938; said appeal was taken in time.

It is therefore evident that the Circuit Court did have jurisdiction to determine "the merits" of the case.

The final decision of the Circuit Court was rendered March 14, 1940. An order was obtained March 19, 1940, staying mandate and granting Bowman until April 20, 1940, in which to file a Writ of Certiorari in the United States Supreme Court; prior to April 20, 1940, an extension of time was granted by the Circuit Court to and including May 1, 1940; thereafter, on the day of 1940, the Petition for Writ of Certiorari was filed.

**Grounds Upon Which It Is Contended the Questions
Involved Are Substantial and Within the Juris-
diction of the Honorable United States Supreme
Court to Review on Certiorari.**

FIRST: The final decision rendered by the Circuit Court is in conflict with decisions of another Circuit Court of Appeals on the same matter and in conflict with decisions of the United States Supreme Court.

SECOND: The final decision rendered has departed from law as determined by the United States Supreme Court so as to call for an exercise of this Court's power of supervision.

Cases Believed to Sustain Jurisdiction Are as Follows:

Gypsy Oil Company v. Lee Bennett Escoe, 275 U. S. 498, on 498 and 499;

Wayne Gas Company v. Owens-Illinois Glass Co., 300 U. S. 131, 137;

Morse v. U. S., 270 U. S. 151, 153, 154;

U. S. v. Seminole Nation, 299 U. S. 417;

National Labor Relations Board v. MacKay R. & Tel. Co., 304 U. S. 333;

In re McCall, 145 Fed. 898;

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286, 287;

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36;

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31;

Duryea Power Co., Bankrupt, v. Sternbergh, 218

U. S. 299;

Bonner v. Potterf, 47 Fed. (2d) 852;

Conboy v. First Nat'l Bank, 203 U. S. 141;

In re Strauss (C. C. A. 2), 211 Fed. 123;

Serkowich v. Wardell, 102 Fed. (2d) 253;

Bostwick v. Brinkerhoff, 106 U. S. 3;

Arnold v. U. S., 263 U. S. 427;

Kingman v. Western Mfg. Co., 170 U. S. 675;

Title 28, Section 225, Subd. a, U. S. C. (*Judicial Code*, Section 128, Amended).

**Appellate Courts Will Not Try Out Controversies in
“Piecemeal”—the Appealed From Judgment Must
Be Final and Complete!**

Collins v. Miller, 252 U. S. 364, 370, and cases
therein cited;

Pearson v. Higgins, 34 Fed. (2d) 27.

Wherefore, your petitioner prays: That a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled, "In the Matter of Lamont William Bowman, Debtor, Lamont William Bowman, Appellant, vs. Martin Loperena, et al., Respondents, No. 8796," to the end that the cause may be reviewed and determined by this

Court as provided for by the statutes of the United States; and that the judgment herein of said Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: at Los Angeles, California, the 27th day of April, 1940.

L. A. LUCE,
Counsel for Petitioner.

J. EARL HASKINS,
Of Counsel.

IN THE
Supreme Court of the United States

....., TERM, 1940.

No.

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J.
LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO
LOPERENA and SEBASTIANA LOPERENA.

BRIEF OF PETITIONER.

Opinions rendered below:

FIRST: The opinion on appeal in the Circuit Court of Appeals for the Ninth Circuit, rendered May 2, 1939.

SECOND: The opinion on rehearing in the Circuit Court above named, rendered August 28, 1939.

THIRD: The opinion on rehearing in the Circuit Court above named from the opinion on rehearing of August 28, 1939, rendered March 14th, 1940.

Jurisdiction.

(Statement of jurisdiction has been covered in the Petition for Writ of Certiorari.)

In support of the contention that this Honorable Court should review this matter on certiorari, petitioner respectfully submits:

ONE.

~~That the Per Curiam Decision Rendered in the Case of Gypsy Oil Company v. Leo Bennett Escoe, 275 U. S. 498, Is Determinative of the Question Which the Circuit Court Has Heretofore Decided Adversely Against Lamont William Bowman.~~

This decision, read and interpreted in connection with the decision of the *Wayne Gas Company v. Owens-Illinois Glass Co.*, 300 U. S. 131, supports the contention of Bowman, that the appeal was allowed and filed within the time allowed by statute under Section 25 (a) of the National Bankruptcy Act, as amended—taking into consideration the time suspended by the petitions for rehearing and decisions thereon.

That part of the *Gypsy Oil Company* case, *supra*, pertinent to the facts of the case at bar, is quoted in full:

"The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse v. United States*, 270 U. S. 151, 153, 154.

"*If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition.*" (The italics are ours.)

In the case at bar the facts are unquestionably applicable to the last portion of the above decision. Bowman actually made application to the District Judge for leave to file his Petition for Rehearing. Said "petition" was "seasonally presented," and "entertained" by the above District Court, and "permission to file same is hereby granted," is the identical wording endorsed on the petition on November 15th, 1937, by the Honorable Ralph E. Jenney, Judge of the District Court. [Tr. p. 97.]

The second petition for rehearing was denied February 17, 1938. Hence it seems that the only interpretation which can be placed on the *Gypsy Oil Company, Morse v. U. S.*, and *Wayne Gas Company* cases is in conformity with the contention of your petitioner, which is that the time for allowance and filing of the appeal did not start to run until the denial of the second petition, to-wit, February 17, 1938.

The Petition for Rehearing From the Circuit Court's Decision Which Was Entered May 2, 1939, Was the Result of Many Hours' Careful Research and Painstaking Preparation, as Will Be Obvious to This Honorable Court Upon Perusal. Your Petitioner Is Confident That the Brief Supporting the Said Petition Was and Is Persuasive of His Contention That the Said Rehearing, Having Been "Seasonally Presented" and "Entertained" by Judge Jenney, and Having Been Heard and Determined by Judge Neterer, Did Toll the Statute Which Limits the Time Within Which an Appeal May Be Taken,—i. e., the Appeal Herein Was Taken in Time. Your Petitioner Therefore Feels That He Can Offer No Better Guide to This Honorable Court Than to Quote, Somewhat Extensively, From the Said Petition, as Follows:

"Appellant respectfully submits that the appeal in this case was not from the Order Denying Petition for Rehearing dated February 17, 1938, but was

from the Order dated October 15th, 1937 (entered October 25th, 1937). [Tr. of R. pp. 87-88.]

"Within the 30 day period allowed for the taking of an appeal, to-wit, on the 15th day of November, 1937, a Petition for Rehearing from the Order entered October 25th, 1937 was filed with the clerk of the District Court. [Tr. of R. p. 89.]

"In accordance with the law pertaining thereto, and prior to the filing of said Petition for Rehearing, said Petition was presented to the Honorable Ralph E. Jenney, District Judge, who placed the following wording thereon before filing:

"This petition having been "seasonably presented" and "entertained" by the above entitled court, permission to file same is hereby granted.

Dated: This 15th day of November, 1937.

RALPH E. JENNEY,
Judge of the District Court.

[Tr. of R. p. 97.]

"Said Petition for Rehearing was heard by the District Judge, sitting in San Diego, Cal., and a written decision denying said Petition for Rehearing was made and entered February 17th, 1938.

The petition for appeal was filed March 18, 1938.
[Tr. of R. pp. 122-128.]

"The record is replete with facts to establish without any question that appellant did not permit any period of time to elapse within which any right of appeal would be lost.

"The right of appeal from an order in bankruptcy proceeding is tolled if a petition for rehearing is filed and entertained within the statutory time for appeal:

"The same rule should govern motions for rehearings and motions for new trials. It thus appears that the date of entry of the judgment, although it may actually be entered at a prior date, is not, for the purposes of appeal, considered as having been entered at the earlier date, but is considered as having been entered on the date when the motion for new trial is disposed of by the lower court."

Sims v. Douglass (C. C. A. 9), 82 Fed. (2d) 812, 815.

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Brockett v. Brockett*, 2 How. 238, 249; *Texas & Pacific Railway v. Murphy*, 111 U. S. 488; *Memphis v. Brown*, 94 U. S. 715; * * *

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36.

"It is universally held, in view of this statute, that the Circuit Court of Appeals has no jurisdiction of a case where more than three months has intervened between the day of judgment or decree and the day * * * the appeal was taken, unless it appears that a motion for rehearing or reconsideration was filed within the term at which the judgment or decree was entered * * * in which case the time between the filing of the motion and its denial will be excluded. (The italics are ours.)

lue & Co. v. Cintron (C. C. A. 1), 73 Fed. (2d) 481.

"It is well settled, of course, that a petition for rehearing duly and seasonably filed suspends the running of the time for taking an appeal. *Morse v. U. S.*, 270 U. S. 151; but, to be seasonably filed for this purpose, it must be filed before the time has expired within which the right to appeal is given by Act of Congress."

McIntosh v. U. S. (C. C. A. 4), 70 Fed. (2d) 507.

To the same effect:

Chicago, M. & St. P. Ry. Co. v. Leverenz (C. C. A. 8), 19 Fed. (2d) 915;

Northwestern Public Service v. Pfeifer (C. C. A. 8), 36 Fed. (2d) 5;

Stradford v. Wagner (C. C. A. 10), 64 Fed. (2d) 749.

"A motion for a rehearing in equity or for a new trial at law tolls the statute limiting the time within which appeals may be taken:

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286, 287;

Morse v. U. S. (supra);

Citizens Bank of Michigan City v. Opperman, 249 U. S. 448;

Brockett v. Brockett, 2 How. (43 U. S.) 238, 240;

Janus v. U. S. (C. C. A. 9), 38 Fed. (2d) 431, 433.

"An order was made in the following case January 19, 1929. In the opinion the court said:

"It appears that *within thirty days* from the date of its entry, a petition for rehearing was filed, was entertained by the court, and denied on *March 22, 1930.*

"The order, because of the pendency of this petition for rehearing, did not become final until the denial of the petition for rehearing March 22, 1930."

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31, and many cases cited therein.

"Appellant was mindful of the fact, when preparing and filing of the Petition for Rehearing and the filing of the appeal, that the right of appeal once lost could not be revived by petition or motion for rehearing, and for his authority on the subject referred to the 1937 Cumulative Supplement to Manual of Federal Appellate Procedure, 2nd Edition, by Paul P. O'Brien, particularly chapter XV thereof, pages 84-86, and cases quoted:

Conboy v. First National Bank, 203 U. S. 141, 145;

U. S. v. Dowell (C. C. A. 8), 82 Fed. (2d) 3;

Zimmern v. U. S. (C. C. A. 5), 80 Fed. (2d) 993;

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131.

"Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal.

2 R. C. L., "Appeal and Error," Par. 6;

In re Hurley Mercantile Co. (C. C. A. 5), 56 Fed. (2d) 1023.

"Did the Order of Adjudication and Reference Become Final Before the Appeal Was Taken?

"August 19, 1936, the Referee filed with the clerk of the District Court, a certificate recommending that the debtor * * * be adjudicated a bankrupt.

"Without notice to said debtor that his Petition for Extension had been denied, and prior to the time that a review could be taken of the said order of the Referee, and on the assumption that the recommendation of the Referee was correct, an Order of Adjudication and Order of Reference (under section 74) was made and entered, August 21, 1936.

"Immediately upon learning of said last named order, to-wit, on August 27, 1936, debtor Bowman filed his Petition for Review of Referee's Order. [Tr. of R. p. 27.]

"September 10, 1936, and within 20 days after the Order of Adjudication, debtor Bowman filed a Petition for Rehearing praying that the decree and order of the Court be vacated and that said cause be reheard and reconsidered. [Tr. of R. p. 29.]

Petition for Review and Petition for Rehearing were set for hearing October 16th, 1936.

"Prior to the time of said hearing, another Notice of Motion for Order to Set Aside and Vacate Order Adjudicating Debtor a Bankrupt was served and filed, and set for hearing October 16th, 1936. [Tr. of R. pp. 32-36.]

"October 16, 1936, said matters came on for hearing before Honorable Paul J. McCormick, District Judge sitting in San Diego, California, at which time the said District Judge ruled that the Referee had erred in making his recommendation and re-referred the entire matter to the Referee for further proceed-

ings, and specifically making the following order and none other:

"This matter coming before the Court for:

1. Hearing on Motion of Martin Loperena, et al., for the Court to hear and determine the objection to bankrupt's petition for re-hearing, etc. pursuant to notice filed September 30, 1936;

2. Hearing on Motion of bankrupt to vacate and set aside order adjudicating debtor a bankrupt and to dismiss proceedings without prejudice pursuant to notice filed October 14, 1936. * * *

whereupon the matter of the Review of the purported order of the Referee dated August 19th, 1936, now coming regularly before the Judge of the Court, and it appearing that the Referee herein has failed to make any order in compliance with said order of re-reference, and has also failed to send up or transmit a Summary of the Evidence as required by the General Orders in Bankruptcy,

It is now ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this Court entered May 15th, 1936, be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an order or orders thereon pursuant to provisions of the National Bankruptcy Act and all amendments thereto and the General Orders in Bankruptcy, and it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on

August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof. [Tr. of R. pp. 37-38.] (The italics are ours.)

"An examination of the above order determines that the Petition for Rehearing⁷ under date of September 10, 1936, filed within 20 days after the Order of Adjudication, and the Motion to Set Aside and Vacate the Adjudication were not ruled upon and no order made thereon October 16, 1936.

"The District Judge specifically held in his order of October 16, 1936, that the Referee had committed error in the proceedings leading up to the Order of Adjudication of August 21, 1936.

"Until such time as the Petition for Rehearing filed September 10, 1936 from the Order of Adjudication filed August 21, 1936, was ruled upon and an order made thereon, the Order of Adjudication of August 21, 1936, is not final.

"Likewise, also until such time as the Motion to Set Aside and Vacate the Order of Adjudication of August 21, 1936, was ruled upon and an order made thereon, the said Order of Adjudication of August 21, 1936, was not final.

"At the time of the allowance of the appeal by the District Judge on March 18th, 1938, neither the Petition for Rehearing filed September, 1936 had been ruled upon nor an order made thereon; and neither had the Motion to Set Aside and Vacate the Order of Adjudication been ruled upon nor an order made thereon.

"The only conclusion that is possible to draw is that the Order of Adjudication of August 21, 1936, was not final, and that the appeal taken from said Order of Adjudication was not too late and that the Circuit Court has jurisdiction to hear and determine the case on the merits.

Judgment Is Not Final as Long as a Motion to Set It Aside Is Pending.

Zimmern v. U. S. (C. C. A. 5), 89 Fed. (2d) 993, 994;

United States Ship. etc., Corp. v. Galveston Dry Dock & C. Co. (C. C. A. 5), 13 Fed. (2d) 607;

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31;

Union Guardian Trust Co. v. Jastromb (C. C. A. 6), 47 Fed. (2d) 689;

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286;

Payne v. Garth, 285 Fed. 301;

Kingman v. Western Manufacturing Company, 170 U. S. 675;

Bostwick v. Brinkerhoff, 106 U. S. 3.

"* * * the Order must be final, but the finality that is required is the action, which disposes of the matter by way of judicial determination. *France & Canada S. S. Co. v. French Republic* (C. C. A.),

285 Fed. 290; *Sullivan v. Associated*, 6 Fed. (2d) 1000, 42 A. L. R. 503. Nothing remained to be done at the time this appeal was taken other than for the clerk to comply with the order of the judge. That was a purely ministerial act which followed as a matter of course. The order was final when the appeal was taken.

In re Reichert, 73 Fed. (2d) 56, affirmed 294 U. S. 116.

"A motion for a rehearing tolls the statute limiting the time in which appeals may be taken.

Mitchell v. Maurer, supra;

Morse v. U. S., 270 U. S. 151;

Citizens Bank v. Opperman, 249 U. S. 448;

Brockett, v. Brockett, supra;

James v. U. S., supra.

"Appellant wishes to specifically call the attention of the Court to the case of *Mortgage Loan Co. v. Livingston* (C. C. A. 8), 45 Fed. (2d) 28, 31, and cases cited therein: This case holds that an order did not become final during such time as petition for rehearing was pending, and can be stated as being directly in point in the case at bar.

"Appellant respectfully submits that the order made May 2nd, 1939, dismissing the appeal for lack of jurisdiction should be vacated, and that said appeal be considered on the merits."

TWO.

What Is a Final Judgment? What Construction Can Be Placed Upon the Minute Order of October 16, 1936 [Tr. 37-38] and What Construction Can Be Placed on the Order of October 25, 1937 [Tr. 87-88]? Will Appeals Be Accepted "Piecemeal"?

There seems to be no question but that, the Minute Order of October 16, 1936, was interlocutory in its nature, and that it was the intention of the Court to "suspend" all proceedings under the Adjudication and Order of Reference.

It therefore follows that the judgment of adjudication could not have been final as long as a proceeding or motion to set it aside was pending.

The question which seems to have been forced upon us, however, is whether or not Bowman should have filed one appeal from the Order entered October 25, 1937, and another appeal from the Order entered February 17, 1938 there being no dispute from an inspection of the petitions for rehearing but that one of the main issues sought to be reviewed and upon which the appeal was based, was whether or not the Adjudication and Order of Reference dated August 21, 1936, was void from its inception.

The following questions must be taken into consideration to determine when the judgment of adjudication became final:

- (1) Was said order interlocutory?
- (2) Will appeals be accepted "piecemeal"?
- (3) What jurisdiction does the Circuit Court of Appeals have in this appeal, if it should be determined that the order of October 16th, 1936, was interlocutory and not final?
- (4) Is it possible for a party to appeal from an order, judgment or decree wholly in his favor?

The minute order made and entered October 16, 1936, by Judge McCormick was not a final order. The Loprenas' contention that Bowman should have appealed from the order of adjudication dated August 21st, 1936, caused by the erroneous and void recommendation of the Referee in Bankruptcy dated August 19, 1936, within thirty (30) days after the adjudication, or within thirty (30) days after interlocutory order of October 16, 1936, is really preposterous. It certainly cannot be said that Bowman "slept on his rights" and did not do everything possible to cause the Adjudication and Order of Reference to be reviewed and brought before the District Judge in the time allowed by law. An inspection of the order of Judge McCormick, dated October 16, 1936, can lead only to one conclusion, and that is that said order was entirely interlocutory. The entire proceedings were "referred to the Referee * * * and particularly any further proceedings under the adjudication and order of reference under Section 74, entered on August 21st, 1936, be stayed until further order of this Court made by a Judge thereof."

Subdivision 1: Was said order interlocutory?

An interlocutory order or decree is defined by the following cases:

In the case of *Buffum v. Maryland Casualty Company*, 77 Fed. (2d) 761, decided by the Ninth Circuit in 1935, we find this language:

"Without determining the question of the amount for which the claim of Peter Barceloux Company should be allowed, it is ordered that the order of the referee rejecting said claim and amendment thereto be and the same is hereby overruled and the matter returned to the referee for further proceedings.

"[3]. It is obvious that the order appealed from is not a judgment allowing the claim, and does not purport to be. It reverses an order rejecting the claim and refers the matter to the referee for the purpose of determining the amount to be allowed upon the claim. The amount of this claim when allowed will again be subject to review by the trial court. *It is not a final order.* *Duryea Power Co. Bankrupt, v. Sternbergh*, 218 U. S. 299, 31 S. Ct. 25, 54 L. Ed. 1047. It is clear then that the allowance of this appeal by the District Court from this interlocutory order did not confer jurisdiction upon this court." (The italics are ours.)

Relative to 11 U. S. C. A., Sec. 48 (original Bankruptcy Act, Section 25(a)), fixing time within which an appeal can be taken. (The appeal in the instant case was from sub. (3), but the reasoning is the same whether taken from a judgment adjudicating defendant a bankrupt or a judgment allowing or rejecting a debt or claim of \$500.00 or over.) The Court said in the case of *Bogner v. Potterf*, (C. C. A. 10), 47 Fed. (2d) 852:

"The question then presented is whether or not the order of the trial court made on January 17, 1929, was a final adjudication, so that the appellant here should have effected his appeal from such order within thirty days of such date, * * *

"It will be observed that the petition filed by the appellant in March, 1929, seeking additional relief by having the matter referred to the referee came more than 30 days after the date of the original order finally adjudicating the claim under the petition for review. This petition is in the record designated as a petition to reopen or, if it be considered as a petition for a rehearing, the effect of such petition and its

status as a legal document, is substantially the same. If it be considered in the nature of a petition for a rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late. *Conboy v. First National Bank*, 203 U. S. 141.

"However, several courts have held that a court may, even after the expiration of the time within which to appeal, in the exercise of its sound discretion, grant a rehearing. In *West v. W. C. McLaughlin & Co.'s Trustee*, 162 Fed. 124, p. 125 (C. C. A. 6), the court in its opinion, after a discussion of the statute here under consideration, uses the following language:

"One purpose which runs through the act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we cannot accept as accurate or sustainable, the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, even after the expiration of 10 days. This court, in the case of *Ives*, 113 Fed. 911, 51 C. C. A. 541, so decided upon a kindred proposition and fully stated the reasons for the rule. The record shows that it was not a mere purpose to evade Section 25-a that

induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only re-examined the questions involved, but more elaborately states his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him. Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied." (The italics are ours.)

In the case of *In re Strauss* (C. C. A. 2), 211 Fed. 123, the Court said:

"Where an appeal from a referee's order denying the application of a bankrupt's trustee to introduce certain testimony and allowing the claim, *the district judge remanded the proceeding to the referee* with instructions to allow the trustee full latitude of inquiry with regard to the claim, but did not pass on the merits of the application to confirm the referee's report, *the order was interlocutory and not appealable.*" (The italics are ours.)

In the case of *Serkowich v. Wardell*, 102 Fed. (2d) 253, it was said:

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or

decree it had already rendered * * * if the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Chappel v. O'Brien*, 22 App. D. C. 190, 193. An order setting aside a nonsuit, or vacating a judgment of dismissal and reinstating a case, since it does not dispose of the whole proceeding, is not final, but interlocutory."

The Supreme Court said in *Arnold v. U. S.*, 263 U. S. 427:

"It is a well-recognized principle that an appeal cannot be taken from an interlocutory order, or from a judgment or decree not final as to all the parties, the whole subject-matter and all the causes of action involved * * * and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

To the same effect see:

Southland Industries v. Federal Communications Commission, 99 Fed. (2d) 117.

In the case of *Triangle Electric Co. v. Foutch* (C. C. A. 8), 40 Fed. (2d) 353, it is said:

"Appeal under Sec. 24 (b) allowed by District Court; and should have been allowed by Circuit Court of Appeals—involved purely intermediate and preliminary order. *Held*: That appeals should be allowed from purely intermediate orders only in exceptional cases."

In the case of *In re Pechin*, 227 Fed. 853, 854, the Court said:

"There must be a certain degree of finality about these administrative orders before they can be reviewed."

In the case of *Kingman v. Western Manufacturing Company*, 170 U. S. 675, there was a motion filed to set aside the judgment and the verdict and for a new trial.

It was held in that case that the judgment did not become final and that the Circuit Court of Appeals are only empowered to review final decisions of the District Courts.

Until such time as the motion or petition is disposed of and a decision made thereon the judgment is not final.

Referring to the aforesaid motion the Honorable Supreme Court of the United States declared as follows:

"No leave to file it was required, and as it was entertained by the court, signed by counsel without objection and passed upon, it must be presumed that it was regularly and properly made.

"This being so, the case falls within the rule if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Citing: *Aspen Mining Co. v. Billings*, 150 U.S. 31; *Brockett v. Brockett*, 2 How. 238, 249; *Texas R. R. Co. v. Murphy*, 111 U. S. 488; *Memphis v. Brown*, 94 U. S. 715; *Northern Pac. v. Holmes*, 155 U. S. 137."

To same effect:

Southland Industries v. Federal Communications Commission, 99 Fed. (2d) 117, *supra*.

The Court in *Mortgage Loan Co. v. Livingston*, 45 Fed. (2d) 28, makes this statement:

"No objection was made to the form of the petition for rehearing, nor was any motion made to strike it, but it was heard by the court on its merits. *Held:* Objections waived and not now available. Order January 19, 1929. Appeal March 22, 1930.

"The order, because of the pendency of this petition for rehearing, did not become final until the denial of the petition for rehearing March 22, 1930."

In the case of *Aspen Mining and Smelting Co. v. Billings*, *supra*, relative to the issue of whether or not a motion or petition for rehearing was entertained the Court stated as follows, on page 37 of the decision:

"But it is said this cannot be the result, under either statute or rule of the mere filing of a motion or petition for rehearing, and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced."

The petition for rehearing filed September 10, 1936, came on regularly to be heard and there were no objections made to the form of said petition, nor was any motion made to strike it. It was heard by the Court on its merits.

It was also held in the foregoing case that the petition for rehearing was duly and regularly entertained by the Court, although there was no actual allowance made by the Court prior to the time of its filing. The same reasoning is to be found in the case of *Mortgage Loan Company v. Livingston*, 45 Fed. (2d) 28.

Subdivision 2: Will appeals be accepted "piecemeal"?

It is fundamental that appeals will not be considered "piecemeal" by appellate courts.

In the case of *Pearson v. Higgins* (C. C. A. 9—Calif., 1929), 34 Fed. (2d) 27, at page 28, the Court declared the law to be as follows:

"That issue—the only substantial one in the case—neither the referee nor the court below has determined. The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants, without awaiting the event of a trial on the merits, petitioned the district judge for a review, and the order from which this appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature. In an ordinary case at law, or in equity, an order over-

ruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding: Appellants have no real grievance unless and until the referee entertained a turn-over order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants have no ground to complain. *Appellate courts do not sit to anticipate possible grievance or to try out controversies in piecemeal.* The appeal will, therefore, be dismissed without prejudice to any question of jurisdiction or upon the merits; costs to appellee." (The italics are ours.)

The Supreme Court case of *Collins v. Miller*, 252 U. S. 364, 370, which was decided in 1920, is the authority for the following rule of law:

"A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *United States v. Girault*, 11 How. 22, 32; *Holcomb v. McKusick*, 20 How. 552, 554; *Boswick v. Brinkerhoff*, 106 U. S. 3, 4; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, 431; *Dainese v. Kendall*, 119 U. S. 53; *Covington v. Covington First National Bank*, 185 U. S. 270, 277; *Heike v. United States*, 217 U. S. 423, 429; *Rexford v. Brunswick-Balke-Callender Co.*, 228 U. S. 339, 346, and the rule required that the judgment to be appealable should be filed not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99, 101; *Sheppy v. Stevens*, 200 Fed. Rep. 946."

Subdivision 3: What jurisdiction does the Circuit Court of Appeals have in this appeal, if it should be determined that the order of October 16th, 1936, was interlocutory and not final?

The jurisdiction of the Circuit Court to hear an appeal from a final judgment or decree (in bankruptcy) is contained in Title 28, Sec. 225, Subdivision (a), U. S. Code (Judicial Court, Sec. 128, amended).

Subdivision (b), same section, covers reviews of interlocutory orders or decrees of District Courts.

Subdivision (c), same section, covers appellate and supervisory jurisdiction in bankruptcy proceedings under Sections 47 and 48 of Title 11, U. S. Code.

Any appeal, other than is provided for in Subdivisions 1, 2 and 3 of Title 11, Section 48, is allowed only in the discretion of the Appellate Court.

We refer, for the sake of brevity, to the 1937 Cumulative Supplement to Manual of Federal Appellate Procedure (second edition) by Paul P. O'Brien; chapter X, which deals with Finality of Decree for Appeal Purposes, designates as not an appealable order:

"An order denying a motion to vacate a judgment or decree." (*Smith v. U. S. (C. C. A.) 7*), 52 Fed. (2d) 848.)

Had Judge McCormick made an order denying appellant's motion to vacate the order of adjudication, such order would not have been appealable, as the only order from which an appeal could have been taken is designated in Title 11, Section 48, Subdivision 1, U. S. Code, to-wit:

"From a judgment adjudicating or refusing to adjudge the defendant bankrupt."

so the only appeal available to Bowman was or would have been from the Adjudication and Order of Reference—not from the interlocutory order of Judge McCormick.

It is apparent, then, under the facts as they existed in this case, that no appeal could have been taken until the rights of Bowman were actually jeopardized, as they were by the order of October 15, 1937, which order vacated the stay of proceedings under the Adjudication and Order of Reference theretofore made by Judge McCormick on October 16, 1936, as aforesaid.

Subdivision 4: Is it possible for a party to appeal from an Order, Judgment or Decree wholly in his favor?

A party cannot appeal from a judgment or decree wholly in his favor, and Judge McCormick's interlocutory order was favorable to Bowman. As authority for the foregoing expression, we refer to the case of *Houchin Sales Co. v. Angert*, 11 Fed. (2d) 115, 118, 119, in which case the Court said:

"That a party may appeal from a judgment in his favor when there has been some error prejudicial to him, or he has not received all he is entitled to * * * there may be grave irregularities or errors which have prevented appellant from receiving the full relief to which he was entitled. While these and other exceptions exist, *the general rule is that a party cannot appeal from a judgment or decree wholly in his favor.*" (The italics are ours.)

The Facts Herein Were, Apparently, Misinterpreted by the Circuit Court.

It seems, from a careful inspection of the final decision of March 14, 1940, that there has been a misinterpretation by the Circuit Court of facts surrounding the applications for rehearing and of the matters adjudicated by the decisions rendered thereon.

The Petition for Rehearing filed September 10, 1936, was filed with the clerk of the District Court at Los Angeles, California (not with the Referee in San Diego, California), and it directly attacks the validity of the Adjudication and Order of Reference entered August 21, 1936. (This proceeding was entirely foreign to and in addition to the Review sought from the ruling of the Referee which was filed August 19, 1938.)

Although the hearing had October 15, 1937, upon which the order of October 25, 1937, was based, was primarily a Review of the Referee's Order denying confirmation of debtor's extension proposals, it may not and cannot be presumed that Bowman abandoned his contention that the Adjudication and Order of Reference was void *ab initio* for he distinctly refers to said Adjudications and Order of Reference in his Petition for Rehearing dated November 15, 1937, by the following wording: "that the adjudication of bankruptcy should be set aside" [Tr. p. 96] and "that this petitioning debtor may have and recover any and all rights which he has lost by reason of the aforesaid orders of the Referee and the said District Judge. [Tr. p. 96.]

THREE.

Was the Adjudication and Order of Reference Void *Ab Initio?*

Bowman has always contended that the Adjudication and Order of Reference of August 21, 1936, was void *ab initio*; not merely voidable. This contention is based on the fundamental principle that the courts in bankruptcy are of statutory origin and possess only such jurisdiction as is expressly conferred upon them by the National Bankruptcy Act.

Before a District Judge could have been empowered to make the Adjudication and Order of Reference above referred to, he must have first been clothed with the necessary jurisdiction. Before this jurisdiction was granted to him the referee hearing the matter in the bankruptcy court must have complied with the provisions of the statute under which he (the referee) was then and there empowered and authorized to act, and without which he could not act.

This proceeding was under the provisions of Section 74 of the National Bankruptcy Act as amended June 7, 1934 (11 U. S. C. A, 202). Subdivision "L" of said last mentioned section is as follows:

"if, (1) the debtor shall fail to comply * * *; or, (2) * * *; or (3) the debtor's proposal has not been accepted by the creditor; or (4) confirmation has been denied; or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal, the court * * *. The Court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in

*bankruptcy or if the confirmation of his proposal has been denied. * * ** (The italicized portions are ours and are the only portions material in this appeal.)

Furthermore, the acts of the Referee are not valid unless he complied with the Amendments and Additions to the General Orders in Bankruptcy, Order of April 17, 1933, paragraph 12, as follows:

“Duties of Referee.

1. * * *

2. * * *

3. * * * Unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto, *shall be heard and decided by the referee.*” (Italics ours.)

As the Referee did not comply with the terms and provisions of the two last named statutes, any act performed by the Referee was contrary to and in excess of the powers and jurisdiction granted to him by said aforementioned statutes. The statement of the Referee on Bowman's petition for review filed September 24, 1936 [Tr. p. 26] states “*said petition for review with supplementary proposal for extension, which is made a part hereof, is herewith returned to your Honorable Court without the statement and certificate on review for the reason that the undersigned, as referee in bankruptcy, has made no order, the review of which is sought in this proceeding by the debtor.*” (The italics are ours.)

Again referring to the General Orders in Bankruptcy under the classification of "Duties of the Referee" we find this language, "unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto shall be heard and decided by the referee."

There can be no question but that the Referee failed to comply with these statutes. He assumed the functions of a "special master" without any order or authority of any kind giving him such power. Therefore, his recommendation was absolutely void *ab initio*.

It was on such erroneously assumed authority and void recommendation that the Adjudication and Order of Reference was made on August 21, 1936.

Judge McCormick orally confirmed Bowman's contention that the adjudication was erroneous, when he so stated from the bench and when he thereafter made his order re-referring the entire matter back to the Referee with appropriate instructions [Tr. pp. 37-38] and when he then and there stayed all proceedings under the Adjudication and Order of Reference.

There was no evidence before the Court that the debtor "commenced or prolonged this proceeding * * * for the purpose of avoiding an adjudication in bankruptcy" [Engrossed Statement of Evidence, Tr. p. 141], and it was equally clear that the Referee "was satisfied that said proceedings were *not* commenced or prolonged for the purpose of delaying creditors and avoiding any adjudication in bankruptcy."

The logical—and in fact the only interpretation of said acts by the Referee conclusively indicates that he was not complying with the statutes conferring jurisdiction upon

him; therefore, and by reason of his failure to comply with said statutes every act of his was void. If the acts of the Referee were void it must follow that the District Judge was not clothed with the necessary jurisdiction to have made and entered the Adjudication and Order of Reference. By the same token, if the recommendation of the Referee was void it must follow that any orders subsequently based on such void acts of the Referee must likewise be void. The Court could not breathe life into such a "dead" recommendation.

Courts of bankruptcy are of statutory origin and possess only such jurisdiction as are expressly or by necessary implication conferred upon them by the National Bankruptcy Act.

Jones v. Kansas City Custom Garment Making Co.,
1 Fed. (2d) 649;

Collier on Bankruptcy (13th Ed. Vol. 1, p. 42);

In re Hollins, et al. (C. C. A. 2), 229 Fed. 349.

In *Windsor v. McVeigh*, 93 U. S. 274, it was said:

"All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions * * *. Though the court may possess jurisdiction of a cause of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by the law * * *. The judgments mentioned * * * would not be merely erroneous. They would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases."

To the same effect:

Ex parte Lange, 18 Wall. 163, 176, 21 L. Ed. 872;

Cornett v. Williams, 20 Wall. 226, 250, 22 L. ed. 254.

The Referee has only powers expressly conferred by statute, court order of reference, order in bankruptcy, by law, or general orders.

In re Faerstein (C. C. A. 9), 58 Fed. (2d) 942.

All of the proceedings of the District Court rest upon the theory that the Order of the Referee was valid.

In re Rosser, 101 Fed. 562-570.

In the case of *C. C. Taft Co. v. Century Savings Bank*, (C. C. A. 8), 141 Fed. 369, court said:

"The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction," citing

The Johnson Company v. Wharton, 152 U. S. 252.

Where the petition for adjudication is bad, the judgment of Adjudication will be reversed.

C. C. Taft Company v. Century Savings Bank, *supra*.

Referee has no jurisdiction, except that conferred by the Bankruptcy Act.

In re Continental Producing Co., 261 Fed. 627;

Blum v. Houser (C. C. A. 7), 202 Fed. 883.

In re Stearns & White Co., 295 Fed. 833, on page 834, the court declared the rule to be:

"The jurisdiction of the bankruptcy court under each Bankruptcy Act has been derived wholly from the provisions of the act, and the court has no equitable jurisdiction independent thereof. *Ex parte Christy*, 44 U. S. 292, 311; *Morgan v. Thornhill*, 78 U. S. 65, 78."

Your petitioner respectfully, although vigorously, insists that the foregoing brief is conclusive of the facts that:

FIRST: The order made by Judge McCormick, on October 16, 1936, was not a final order; it was merely an *interlocutory order* and it therefore could not be appealed from by petitioner; in any event, the order was not and could not have been sufficiently final to be appealed from and, in addition, appellate tribunals will not consider appeals "piecemeal"; further, the said order being favorable to petitioner, would have made an appeal unavailing, as one cannot appeal from an order favorable to him.

SECOND: The second rehearing in the District Court which was "seasonably presented" and "entertained" by the said District Court did toll the running of the time for an appeal and therefore the appeal herein was filed in time, i. e., within the statutory period and it thereby vested the Circuit Court with jurisdiction to hear and determine "the merits" of the appeal.

THIRD: It seems apparent that the Circuit Court must have misinterpreted the facts herein, probably by failing to distinguish between the first petition for rehearing filed in and granted by the District Court and a petition for review—from an entirely different ruling by the referee—which was filed about the same time; this must have re-

sulted in the Circuit Court confusing the issues to be determined on "the merits."

FOURTH: It seems fundamental that neither the referee nor the bankruptcy court could or can make any order or orders in excess of the authority and jurisdiction specifically granted to them by the statutes comprising the National Bankruptcy Act. In the case at bar, both the referee and the Court assumed authority and assumed jurisdiction in excess of that granted to them by the said National Bankruptcy Act. It, therefore, follows inevitably that the Adjudication and Order of Reference was made in excess of the jurisdiction and authority of the bankruptcy court; and the same was and is void *ab initio*—this is particularly true because the Adjudication and Order of Reference was predicated upon the recommendation of the referee which said recommendation was void from its inception.

It is respectfully maintained that this cause is one calling for the exercise by this Honorable Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the said decisions of the Circuit Court.

Respectfully submitted,

L. A. LUCE,

Counsel for Petitioner.

J. EARL HASKINS,
As of Counsel.

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FILE COPY

U. S. DISTRICT COURT

OCT 28 1940

CHARLES FELIX LOPERENA
vs.

In the

Supreme Court of the United States

October Term, 1940

No. 59.

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J.
LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO.
LOPERENA and SEBASTIANA LOPERENA.

SUPPLEMENT TO BRIEF ON CERTIORARI.

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In the
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SUPPLEMENT TO BRIEF ON CERTIORARI.

Explanatory Statement.

This supplement to petitioner's brief on certiorari is predicated upon the hypothesis that the Circuit Court of Appeals (Ninth Circuit) did have jurisdiction to entertain Bowman's appeal on the merits. Therefore, we will herein confine ourselves to the merits of the original appeal from the adjudication and order of reference.

Supplemental Statement of Facts.

Stanley T. Howe, Referee in Bankruptcy (in San Diego, California), on August 19, 1936, after certain hearings on the extension proposal of the debtor herein, prepared and forwarded to the clerk of the District Court at Los Angeles, California, a document entitled "Certificate of Referee on Debtor's Petition for Extension". This document was filed by said clerk on August 21, 1936 [Tr. of Record, pp. 19-24]. Said certificate reflects [Tr. of Record, p. 24] the following important and unusual language:

"I therefore *recommend* that the proposal or proposals of the debtor for an extension under section 74 of the Bankruptcy Act *be not confirmed* and that the debtor be adjudged a bankrupt." (The italics are ours.)

The Honorable Albert Lee Stephens, District Judge, pursuant to and entirely based on said certificate, "ordered that the clerk make and sign Order of Adjudication and Reference in the following case: 1048 Lamont William Bowman." [Tr. of Record, pp. 17-18.] This adjudication, which was thereafter filed with the clerk of the District Court, is the subject matter of this appeal.

Bowman, on August 27, 1936, filed his petition for review of referee's order [Tr. of Record, pp. 27-28.]

Referee Howe, on September 24, 1936, filed another document (bearing no date) with the clerk of the District Court, entitled "Statement of Referee on Petition of Debtor for Review." [Tr. of Record, pp. 25-26.] Part of this statement is of great importance herein; it reads as follows:

"Said petition for review, with the supplemental proposal for extension which is made a part thereof, is herewith returned to your Honorable Court *without* a statement and certificate for review for the reason that the undersigned as Referee in Bankruptcy, *has made no order the review of which is sought in this proceeding by the debtor.*" (The italics are ours.)

Question Involved.

I.

Can an adjudication and order of reference made by a bankruptcy court, in excess of and contrary to the authority and jurisdiction expressly granted to said court by the National Bankruptcy Act and the general orders in bankruptcy, have any validity?

ARGUMENT.

Powers of the Bankruptcy Court.

Courts of bankruptcy are of statutory origin and possess only such limited jurisdiction as are expressly conferred upon them by the National Bankruptcy Act and by the General Orders in Bankruptcy. This rule of law is fundamental and is established by a legion of federal authorities—we quote from a few of them, as follows:

Jones v. Kansas City Garment Making Company,
1 Fed. (2d) 649:

"Courts of bankruptcy are of statutory origin and possess only such jurisdiction as are expressly or by necessary implications conferred upon them by the National Bankruptcy Act. . . . The order of the bankruptcy court . . . being predicated upon the findings made by the referee without jurisdiction to act was properly set aside by the bankruptcy court."

C. C. Taft Co. v. Century Savings Bank (C. C. A. 8), 141 Fed. 369:

"The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction."

Windsor v. McVeigh, 93 U. S. 274, at page 282:

"All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of action, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable, or to transactions of a special

character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments.

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.

" . . . So a departure from established modes of procedure will often render the judgment void; . . . and the reason is, that the courts are not authorized to exert their power in that way."

" . . . The doctrine . . . is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it."

Nixon v. Michaels (C. C. A. 8), 38 Fed. (2d)

420:

"A District Court of the United States, sitting as a court of bankruptcy is a court of limited jurisdiction . . . The express provisions of the statute and the necessary implications are controlling."

Wheeling Structural Steel Co. v. Moss (C. C. A. 4), 62 Fed. (2d) 37:

"The jurisdiction of a court of bankruptcy is of a limited character, statutory in its origin, and it covers only such matters as are specified in the statute, and they must be dealt with as the statute directs"—citing *In Re Hollins*, 229 Fed. 833; *In Re Stearns v. White*, 295 Fed. 833.

Hence, we maintain that the only authority under which the bankruptcy court could have made a valid adjudication and order of reference must be found in one of the following statutes (Grants of Power):

(A) *General Orders in Bankruptcy*, as adopted by the Supreme Court of the United States, Nov. 28, 1898; and as amended April 24, 1933; and June 1, 1936.

(B) Section 38 (*Jurisdiction of Referees*), (11 U. S. C. A. 66), of the National Bankruptcy Act.

(C) Section 39 (*Duties of Referees*), (11 U. S. C. A. 67.)

(D) Section 74 (*Provisions for Relief of Debtors*), (11 U. S. C. 202), added to the Bankruptcy Act by Act of March, 1933, and as amended June 7, 1934.

We will show that the express provisions of the foregoing statutes were not complied with by the referee or by the court. We will also show that the adjudication and order of reference, dated August 21, 1936, was in excess of and contrary to the power, authority or jurisdiction granted to the court and therefore it was void *ab initio*.

All of which leads to the inevitable conclusion that authority of the court, to adjudicate a debtor a bankrupt, is not an arbitrary power, but, on the contrary, is a limited power conferred solely by statute (section 74 of the National Bankruptcy Act and Chapter XII of the General Orders in Bankruptcy) and any adjudication not based on statute is void.

Duties (Powers) of the Bankruptcy Referee.

The referee in bankruptcy has only such powers as are given to him by the National Bankruptcy Act, General Orders in Bankruptcy, the order of reference or as specifically delegated to him by a Judge of the Bankruptcy Court.

The "Duties of Referee", here pertinent, are set forth in Chapter XII of *General Orders in Bankruptcy*, as amended April 24, 1933, and June 1, 1936, as follows:

1. The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee and from that day the bankrupt or debtor shall be subject to the orders of the court in all matters relating to the proceedings, and may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of a composition or extension proposal. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. *And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the Judge, shall be had before the referee.*

2. The time when, and place where, the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; *and at such times and places the referees may perform the duties which they are empowered by the Act to perform.*

3. Applications for a discharge, or for the confirmation of a composition where the proceeding is had under Section 12 of the Act, or for an injunction to stay proceedings of a court or office of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee; or in proceedings under Section 77, and Section 77B of the Act, to a special master, to ascertain and report the facts. *Unless otherwise ordered by the Judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto, shall be heard and decided by the referee.* (The italics are ours.)

The foregoing excerpts from Chapter XII of the General Orders in Bankruptcy require—mandatorily require—the referee to *hear and decide* the application for the confirmation of debtor's proposal under section 74 of the National Bankruptcy Act. The referee, in the instant case, did not *hear and decide* said application; on the contrary, he *recommended* that the debtor's proposal be not confirmed—such recommendation was contrary to the distinct provisions of the statutes and in excess of the powers conferred by the National Bankruptcy Act itself.

An extremely well-reasoned case, holding that the referee has only the powers expressly conferred by statute, court order of reference, order in bankruptcy, or General

Orders, is *In Re Faerstein* (C. C. A. 9), 58 Fed. (2d) 942, where, at page 943, the court said:

"(1, 2) Referees are invested with certain powers, 'subject always to review by the judge'; Section 66, Title 11, U. S. C. A. The referee has no independent judicial authority. He is not a distinct court, and has no power not conferred by order of reference, by law, or General Orders. 'The District Court of the United States in the several states . . . are made courts of bankruptcy.' 11 U. S. C. A. Sec. 11.

'A referee is an instrumentality of the court with limited powers. His jurisdiction is confined by Section 66, Title 11, U. S. C. A. *supra*, and his duties are given in section 67.'

"General Order No. 27 of the Supreme Court (11 U. S. C. A. 53) provides that, when a review is sought of any order of the referee, a petition shall be filed with the referee setting forth the error complained of and the referee shall certify to the United States District Judge the question presented, a summary of the evidence, and finding and order of the referee thereon. The procedure is specific and clearly stated . . ."

In the case at bar the referee not only failed to comply with the procedure as to the manner of the adjudication, but he also failed to comply with one of the fundamental jurisdictional pre-requisites—to deny confirmation of debtor's proposal.

To the same effect is the case of *Chandler v. Perry* (C. C. A. 5), 74 Fed. (2d) 371, where the court said, on page 373:

"The referee is not the court of bankruptcy, but an officer of it. He has such powers as the act and

the order of reference given him, or as the judge specifically delegates to him. *Weidhorn v. Levy*, 253 U. S. 268, 40 S. Ct. 534, 64 L. Ed. 898. These powers, however, are so broad that the act declares that in its provisions the word 'court' may include the referee. Section 1 (7) of the Act (11 U. S. C. A. Sec. 1 (7).) *MacDonald v. Plymouth County Trust Co.*, 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093. In stating his jurisdiction, the Act, in section 38(4) of the Act (11 U. S. C. A. Sec. 66 (4).) provides that he may 'perform such part of the duties, except as to the questions arising out of the applications of bankrupts for composition or discharge, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy, except as herein otherwise provided.' *General Order* 12(1), 11 U. S. C. A. Sec. 53 provides that after the reference of a case to the referee the bankrupt shall attend before him and 'thereafter all of the proceedings except such as are required by the Act or by these General Orders to be had before the judge shall be had before the referee.' "

The leading case of *Weidhorn v. Levy*, 253 U. S. 268, most ably discusses the question of whether the referee exceeded the authority and jurisdiction conferred upon him by the Bankruptcy Act and the General Orders of Reference, in this language:

"Referees respectively are hereby invested, subject always to a review by the judge . . . with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of applications of bankrupts for compositions or discharges; as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the

courts of bankruptcy of their respective districts, except as herein otherwise provided.

"These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the Act; and that his judicial functions, however important, are subject to the review of the bankruptcy court. In the general orders established by this court pursuant to the Act under Section XII(1) provision is made for an order referring a case to a referee . . . and thereafter all the proceedings, except such as are required by the Act or by these General Orders to be before the judge shall be had before the referee." (172 U. S. 657.)

The case of *In re McMurray*, Fed. Supp. 449, holds:

"The power and authority of the court, the judge, the commissioner, or referee, and of other officers, is limited to the authority granted by the Act itself."

The mandatory requirement that the referee *hear and decide* applications for the confirmation of a debtor's proposal under section 74 of the National Bankruptcy Act is jurisdictional. The power to *hear and decide* obviously means that the referee is required to hear and decide by making his order based on his said decision.

No order was made by the referee, prior to adjudication; therefore the District Judge was without power, authority or jurisdiction to make and enter an order adjudicating Bowman a bankrupt, particularly when such order was based on a void recommendation of the referee.

The Referee Could Not Have Acted as a Special Master.

Referee Howe must have attempted to assume the functions of a special master, although he was never so appointed. This assumption appears to be the only one that could legitimately result in said referee's use of the word "recommendations"; but such premise is untenable when it is realized that he could not act as a special master in the absence of a specific order of the court authorizing him so to act.

Paragraph 3, Chapter XII of *General Orders in Bankruptcy*, provides the judge may refer an application under section 77 or 77B of the *National Bankruptcy Act* to a special master to ascertain and report the facts—but this provision can only be effective when the District Judge has made an order authorizing such appointment. There is, however, no provision for an appointment of a special master under section 74 of the Act; on the contrary, under Chapter XII of the *General Orders in Bankruptcy*, it becomes the duty of the referee to hear and decide applications for the confirmation of a debtor's proposal under section 74 of the Act.

The Provisions of Section 74 of the National Bankruptcy Act Preclude an Adjudication and Order of Reference Herein.

The only powers granted to bankruptcy courts are set forth in the Act itself.

Subdivision "L" of section 74 of the *National Bankruptcy Act*, provides the only method by which an adjudication can be made and entered.

Section 74 of the Act provides that the court may appoint the trustee nominated by the creditors at the first

meeting, and if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate,

If:

- (1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or
- (2) the debtor has failed to make the required deposit in case of a composition; or
- (3) the debtor's proposal has not been accepted by the creditors; or
- (4) confirmation has been denied; or
- (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of the debtor or his property."

The following additional excerpt from this section is of exceeding importance to this appeal:

"The Court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceedings for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied." (The italics and underlining are ours.)

The court could not have acquired jurisdiction to make or enter its order adjudicating the debtor a bankrupt, unless one of two contingencies were present:

First: the court must have found and *been satisfied* that the debtor commenced or prolonged the proceedings for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or

Second: the confirmation of debtor's proposal had been denied.

Re First Contingence.

There is no finding herein that the debtor "commenced or prolonged the proceedings for the purpose of avoiding an adjudication—on the contrary, there is, in the Engrossed Statement of Evidence [Tr. of Record, pp. 122-124], prepared July 5th, 1938, under the supervision of Stanley T. Howe, referee [Tr. of Record, p. 120], and approved by the District Judge as correct [Tr. of Record p. 142], a finding that "that in none of the Certificates of the Referee or the Orders made by the Referee, pursuant to the evidence introduced at all of said proceedings and heard and considered by the Referee, is there any finding that the debtor commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy?" [Tr. of Record p. 141]. Hence, the first contingency was not present.

It should again be noted, at this point, that the adjudication and order of reference by the District Judge was predicated solely upon the void "recommendation" of the referee [Tr. of Record p. 17].

Re Second Contingency.

Section 74 of the Act, in authorizing an adjudication distinctly provides that "the Court Shall in Addition" adjudge the debtor a bankrupt if "confirmation has been denied."

It has been herein shown the confirmation of the debtors proposal was not denied at the time the adjudication and order of reference was made and entered. Hence, the second contingency was not present.

Therefore, the court was in error when it "ordered that the clerk make and sign order of adjudication and reference" because the necessary jurisdictional elements were lacking. This being true, the adjudication itself is void *ab initio* and no subsequent act or order of the court could breathe life into it.

The order of October 25, 1937, by District Judge Neterer directing the referee to proceed under the order and reference, dated August 21, 1936, [Tr. of Record pp. 87-88] specifically referred to the original adjudication and order of reference. Therefore, it likewise was void. The original adjudication being void, no subsequent order based thereon could be valid.

Conclusion.

We respectfully maintain that we have established that the court was without power, authority or jurisdiction to have "ordered that the clerk make and sign Order of Adjudication and Reference." We have shown that said order, as based upon the "recommendation" of the referee was void *ab initio*.

We respectfully urge that the adjudication and order of reference be vacated and set aside, that appellant be restored to *status quo* as of the date of the void adjudication and for such other relief as may seem meet and proper to this Honorable Court.

Respectfully submitted,

L. A. LUCE,

Counsel for Petitioner.

J. EARL HASKINS,
As of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 59.—OCTOBER TERM, 1940.

Lamont William Bowman, Petitioner,
vs.
Martin Lopereno, Georgia Lopereno
and Martin J. Lopereno, et al. } On Petition for Writ of
Certiorari to the United
States Circuit Court of
Appeals for the Ninth
Circuit.

[December 9, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The sole question for decision is whether the Circuit Court of Appeals properly dismissed as untimely an appeal from an order made by a District Court sitting in bankruptcy.

The proceeding was initiated by the petitioner, hereinafter spoken of as the debtor, in the District Court, for an extension under § 74 of the Bankruptcy Act as amended.¹ The petition, filed May 23, 1935, was referred to a referee, who denied it July 26, 1935. May 15, 1936, the court, on petition for review, re-referred the cause to a referee, who, on August 19, 1936, filed his certificate with the court in which he concluded: "I therefore recommend that the proposal or proposals of the debtor for an extension under § 74 of the Bankruptcy Act be not confirmed, and that the debtor be adjudicated a bankrupt."

August 21, 1936, the District Court, reciting the referee's recommendation, made an order adjudicating the debtor a bankrupt and again referring the cause to the referee for further proceedings in bankruptcy.

August 28, 1936, the debtor prayed a review and the referee certified the matter to the court. In the petition for review both the action of the referee in reporting his recommendations instead of granting or dismissing the petition for extension, and the action of the court on the referee's report adjudicating the

¹ Act of March 3, 1933, c. 204 Sec. 1, 47 Stat. 1467; Act of June 7, 1934, c. 424 Sec. 2, 48 Stat. 922, 923; 11 U. S. C. (1934) § 202.

debtor a bankrupt, were challenged. September 10, 1936, the debtor filed a petition for rehearing of the order of adjudication, praying that it be vacated and the cause reheard. October 14, 1936, motion was filed by the debtor, after due notice to the parties in interest, praying that the order of adjudication be vacated and the proceeding dismissed without prejudice.

October 16, 1936, a district judge heard the motion for rehearing and the motion to vacate the adjudication and entered an order that the entire matter of the debtor's petition for extension which was re-referred to the referee May 15, 1936, be again re-referred to him with direction to hear and consider the petition for extension and any supplemental petition, and to make an order or orders thereon as provided by the Act and the General Orders, and continuing: "it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof." It will be observed that the court did not finally dispose of the petition and motion so far as they were directed to the adjudication of the debtor.

Proceedings on a supplemental proposal of extension were had before the referee from time to time and eventuated, on June 14, 1937, in an order denying the petition for extension. The debtor presented a petition for review to the referee July 15, 1937, and thereupon the latter made and forwarded to the court his certificate reciting the proceedings and certifying the evidence. The matter came on for hearing before the District Court and, on October 25, 1937, a judge of that court confirmed the order of the referee and ordered that the stay of proceedings under the order of adjudication of August 21, 1936, should be vacated and that the referee should proceed to perform his duties under the adjudication and order of reference.

November 15, 1937, the debtor filed a petition for rehearing in which he asked, *inter alia*, that the adjudication in bankruptcy be vacated and set aside. On the same day a judge of the District Court endorsed upon the petition:

"This petition having been 'seasonably presented' and 'entertained' by the above entitled court, permission to file same is hereby granted."

The petition for rehearing was heard by a judge of the District Court and, on February 17, 1938, he rendered his opinion and made an order thereon. In the opinion he said:

"This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate."

His order was: "The petition for review is denied."

March 18, 1938, an appeal to the Circuit Court of Appeals was allowed by the District Court. In his petition for appeal the debtor stated that he "does hereby appeal . . . from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, . . . ". His first assignment of error was to the order of adjudication.

The court below dismissed the appeal² in the view that, while it was taken within thirty days of the order denying the petition for rehearing, it came too late because the adjudication was entered August 21, 1936, and the time for appeal therefrom expired thirty days thereafter unless the running of time for taking appeal was suspended by application for rehearing. The court construed the petition for rehearing of September 10, 1936, as directed rather to the action of the referee than to the order of adjudication, but that petition, as we have seen, recited the adjudication, alleged that it was erroneous, and prayed that it be vacated. This position was reiterated in the motion of October 14, 1936, and both the petition and the motion were heard together and were the basis of the order of October 16, 1936, re-referring the case and staying the effective date of the adjudication until the further order of the court.

As appears from the order of October 25, 1937, the District Judge understood that the question of the propriety of the adjudication was before him and dealt with it in his denial of the petition. Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and the hearing held and opinion announced

²In re Bowman, 110 F. (2d) 348.

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Bowman vs. Lopereno et al.

upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.

These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal.³ But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.⁴

We hold that the court below should have entertained the appeal.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

³ Morse v. United States, 270 U. S. 151, 153, 154; Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137.

⁴ Voorhees v. John T. Noye Mfg. Co., 151 U. S. 135, 137; Gvnsy Oil Co. v. Escoe, 275 U. S. 493, 499; Wayne United Gas Co. v. Owens-Illinois Glass Co., *supra*, 137, 138.